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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

THE FIRST ARABIAN CORPORATION, S.A.
Petitioner,

vs

GHAITH R. PHARAON
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED

WHETHER FEDERAL ANCILLARY JURISDICTION CAN BE ASSERTED OVER A CROSS-CLAIM BETWEEN TWO ALIENS, SUBSEQUENT TO DISMISSAL OF THE MAIN CLAIM GIVING RISE TO FEDERAL JURISDICTION, WHEN THAT CROSS-CLAIM WAS ONLY TANGENTIALLY RELATED TO, AND NOT LOGICALLY DEPENDENT UPON THE RESOLUTION OF THE MAIN CLAIM?

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A. Case Authorities

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NO.

THE FIRST ARABIAN CORPORATION, S.A.
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vs

GHAITH R. PHARAON
Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

Petitioner prays that a Writ of *Certiorari* issue to review the Order of the United States Court of Appeals for the Sixth Circuit dated May 3, 1983, affirming the denial of a Motion to

[1]As required by Supreme Court Rule 21.1(b), the following gives a history of this case and lists all parties. In the United States District Court for the Eastern District of Michigan, the matter was captioned *Eli Broad & Donald Kaufman, Plaintiffs* v *James T. Barnes, Sr., James T. Barnes, Jr., Ghaith R. Pharaon & The First Arabian Corporation, S.A., Defendants; Ghaith R. Pharaon, Cross-Plaintiff* v *The First Arabian Corporation, S.A., Cross-Defendant*, No. 77-72757. The original dispute between Plaintiffs and all Defendants being settled pursuant to dismissal of those claims (Appendix, pp. 17a-18a), only the entry of Summary Judgment on the Cross-Claim of PHARAON against FIRST ARABIAN was the subject of appellate proceedings in the United States Court of Appeals for the Sixth Circuit in Case No. 82-1209. The case bore the same caption as in the District Court, however, with the FIRST ARABIAN CORPORATION, S.A., being designated Appellant and GHAITH R. PHARAON, Appellee.

Also, pursuant to Supreme Court Rule 28.1, Petitioner, THE FIRST ARABIAN CORPORATION, S.A., is a Luxembourg Corporation and owns controlling interest in the Bank of the Commonwealth. The following are subsidiaries or affiliates of FIRST ARABIAN: First Arabian Argibusiness, S.A.E., First Arabian Investments, Inc. and S.D.C. Financial Corp.

Dismiss for want of jurisdiction made by Petitioner and the entry of Summary Judgment in favor of the Respondent by the United States District Court for the Eastern District of Michigan.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit dated May 3, 1983 which affirmed the District Court's entry of Summary Judgment in favor of the Respondent and denial of Petitioner's Motion to Dismiss for want of jurisdiction, is unreported and appears in the Appendix, pp. 1a-4a. The Summary Judgment and Order Denying Motion to Dismiss entered by the United States District Court for the Eastern District of Michigan, and the transcription of its oral ruling regarding the same, are similarly unreported and are set forth, respectively, in the Appendix, pp. 8a, 9a, 11a-17a.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming Summary Judgment was entered May 3, 1983. A timely Petition for rehearing was denied on June 3, 1983, Appendix, p. 20a. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The above referenced provisions can be found in the Appendix as permitted by Supreme Court Rule 21.1(f).

STATEMENT OF THE CASE

The Petitioner, THE FIRST ARABIAN CORPORATION, S.A. purchased from the Respondent, GHAITH R. PHARAON a controlling interest of common voting shares in a Michigan Banking Corporation, the Bank of the Commonwealth. (The foregoing are sometimes referred to hereafter as, respectively, First Arabian, Pharaon and the Bank). This occurred pursuant to negotiation and agreement transacted and consummated in Jeddah, Saudia Arabia in January, 1976.[2] The Respondent's allegation that FIRST ARABIAN refused to make a final installment payment of Seven Hundred Fifty Thousand ($750,000.00) Dollars on this contract formed the sole basis of a cross-claim litigaged in an otherwise unrelated case. It was solely that tangential cross-claim that was before the District Court when summary judgment was entered (the claims that had given rise to federal jurisdiction having long since been dismissed pursuant to settlement) and solely that cross-claim that was the subject of appellate review. It is this simple contract dispute between two aliens, in all likelihood governed by the laws of Saudi Arabia or Luxembourg, over which the Petitioner submits the federal courts have no subject matter jurisdiction.

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[2]The parties were in material dispute in the Courts below as to whether their relationship was controlled by a series of documents executed on or about December 31, 1975 and early January, 1976 or by an Agreement dated November 12, 1976, despite the fact that Summary Judgment was sustained in the face of such disputed issues of material fact. Primarily, this had significance to Petitioner's contention that FIRST ARABIAN was improperly or fraudulently induced to enter into the earlier (December, 1975-January, 1976) Agreement through PHARAON's failure to reveal outstanding bad loans of the Bank, comprising approximately one-third (1/3) of its outstanding international loan commitments. At the same time it granted Summary Judgment, the District Court refused to permit FIRST ARABIAN to amend its pleadings to assert such defenses (Appendix, p. 10a) and was sustained in this by the Court of Appeals (Appendix, pp. 3a-4a). Due to the discretionary nature of the denial, Petitioner elects not to burden the Court with argument regarding this issue but rather merely presents the issue of absence of jurisdiction.

In contrast to the contract claim, the claims originally asserted by the Plaintiffs below which *did* properly invoke federal jurisdiction were of a very different character — both legally and factually. On June 30, 1977, ELI BROAD and DONALD KAUFMAN (sometimes referred to hereafter as Plaintiffs) commenced a civil action in the United States District Court for the Central District of California claiming they had been frauduently deprived of dividends due them as owners of *preferred* stock in the Bank of the Commonwealth. They named as Defendants all persons in the chain of ownership of the controlling interest of the Bank's *common* voting shares. These included James T. Barnes, Sr. and James T. Barnes, Jr. (sometimes referred to hereafter as the Barnes), Respondent, PHARAON and Petitioner, FIRST ARABIAN. The Barnes, as original owners of the controlling interest, had sold their shares to PHARAON in February, 1975; PHARAON, in turn, sold the shares to FIRST ARABIAN in 1976, as discussed *supra*.

Plaintiffs invoked the Securities and Exchange Act of 1934, and subsumed regulations, as the substantive and jurisdictional predicate for the relief prayed. There were also attendant California State law claims. The District Court's jurisdiction was said to be founded upon the Exchange Act, 15 USC §78aa, and diverse citizenship, 28 USC §1332. Prior to answer the case was transferred to the Eastern District of Michigan under 28 USC §1401. All Defendants thereafter answered. They all denied the fraud. They said any detriment suffered by the Plaintiffs resulted from the Bank's poor financial condition and certain reorganization plans that the FDIC had mandated.

The case carried on without incident until February 13, 1980 when PHARAON prayed the Court permit it to amend its pleadings, which was allowed by Order dated March 18, 1980. (Appendix, p. 19a, pp. 21a-24a). The Amendment included PHARAON's

cross claim against FIRST ARABIAN, discussed *supra*, alleging the failure to make the final installment (due February 1, 1980) on the 1976 contract to purchase the common stock, over which there was no independent basis for federal subject matter jurisdiction. FIRST ARABIAN answered the cross claim.

The remainder of the suit — i.e., the main claims asserted by Plaintiffs which gave rise to federal jurisdiction — were resolved on February 12, 1981 when Plaintiffs released all the Defendants pursuant to settlement and an Order of partial Dismissal to that effect was eventually entered on July 9, 1981. (Appendix, pp. 17a-18a). Only the contract cross-claim between the two aliens remained in the case.

Thereafter, PHARAON's earlier filed Summary Judgment Motion on the cross-claim was scheduled to be heard by the trial court and was opposed by FIRST ARABIAN. Moreover, FIRST ARABIAN made two defensive Motions. One sought leave to amend the pleadings to assert a more specific defense to the cross claim; the other, a Fed. R. Civ. P. 12(b)(1) Motion to Dismiss, challenged the Court's subject matter jurisdiction over the cross-claim.

The District Court, at a hearing conducted on October 22, 1981, ruled from the bench against FIRST ARABIAN on all Motions. (Appendix, pp. 11a-17a). Relative to the Motion to Dismiss it erroneously relied upon a citation from Moore's Federal Practice in concluding that whether or not the suit continued in federal court was a matter of "discretionary pendent jurisdiction." (Appendix, pp. 13a, 16a). Summary Judgment and Orders Denying Dismissal and to Amend, were then entered on November 10, 1981. (Appendix, pp. 8a-10a). Timely Motions for Reconsideration attempted, *inter alia*, to demonstrate that the Court had completely misperceived the antecedent submission made by FIRST ARABIAN, i.e., that the cross-claim was not sufficiently connected to the main claims to justify its being litigated as a cross-claim under Fed. R. Civ. P. 13(g) or to per-

mit the corollary exercise of ancillary jurisdiction. The Motion was denied.[3]

A Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed by FIRST ARABIAN on March 4, 1982, and the Appeal was thereafter perfected, briefed and argued. In a cursory opinion and Order dated May 3, 1983, the Sixth Circuit held that the cross-claim was proper under Fed. R. Civ. P. 13(g) and that the District Court therefore had jurisdiction. The Court stated that "[t]his circuit follows that "logical relationship" test" (Appendix, p. 3a) and concluded that such a "logical relationship" existed between the Plaintiffs' original claim for securities violations and the cross-claim alleging breach of a contract regarding purchase of common stock, primarily because both involved Bank stock. Other factors stated as evidencing this "logical relationship" were 1) the fact that the sale of the common stock by PHARAON to FIRST ARABIAN was alleged in both claims; and 2) FIRST ARABIAN's inclusion, in its Answer to the cross-claim, of a boiler plate reference back to its defenses to the original suit. Also the Court inexplicably stated "[t]he same factual background was necessary to resolve both claims." A timely Motion for Rehearing was denied on June 3, 1983. (Appendix, p. 20a).

[3]FIRST ARABIAN's Motion for Reconsideration actually was comprised of two separate documents which were both timely filed on the same date. The portion going to absence of jurisdiction was denied, by letter, dated December 7, 1981. (Appendix, p. 7a). The other portion, seeking Reconsideration of the Denial of Leave to Amend and of Entry of Summary Judgment, was denied March 2, 1982. (Appendix, pp. 5a-6a).

REASONS WHY THE WRIT SHOULD ISSUE

I

THE ADJUDICATION OF THE CROSS-CLAIM *SUB JUDICE* VIOLATES FUNDAMENTAL PRINCIPLES OF THE LIMITED NATURE OF FEDERAL COURT SUBJECT MATTER JURISDICTION ANNUNCIATED BY THIS COURT.

It is axiomatic that the federal courts of this country have limited subject matter jurisdiction. The parameters of that limitation are dictated, in the first instance, by the Constitution and thereafter by Acts of Congress, where permitted. *Turner* v *President, Dirs., & Co., of the Bank of No. America*, 4 Dall. 8 (1799). *See* 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §3522. Nowhere within Art. III, §2 does the Constitution extend the judicial power of the United States to the federal courts to adjudicate disputes of the variety involved in the cross claim *sub judice*, i.e., in an action between two aliens. Indeed, an explicit attempt by the First Congress to bestow such jurisdiction upon the federal courts, Judiciary Act of September 24, 1789, 1 Stat. 73, c.20, was, explicitly, rejected as not within their competence. *Hodgson* v *Bowerbank*, 5 Cranch 303, 304 (1809). *See also* P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts & The Federal System* (2d.ed. 1973) 1061.[4]

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[4]This Court has just recently held that Congress, pursuant to "the arising under" federal law clause of the Constitution (but *not* pursuant to the diversity clause), can authorize federal court jurisdiction over a suit between an alien and *a foreign state*. *Verlinden B. V.* v *Central Bank of Nigeria*, --US--, 51 LW 4567, 4570 (May 24, 1983). Of course, there is absolutely no issue involved in this cross-claim (which does *not* involve a foreign state) that could be considered one of federal law "arising under" 'the Constitution, the laws of the United States and treaties made under their authority' to render that decision even remotely relevant here. In fact, the Court in *Verlinden* found that the dispute was one "arising under" United States' laws because a *foreign sovereign* was being sued in United States Courts —a factor clearly absent from this suit between two private aliens.

Moreover, nowhere does Art. III, §2 discuss, much less expressly authorize an exercise of "ancillary jurisdiction." The statutes of the United States are similarly silent on subject. Such "jurisdiction" has arisen and crept into our law only as a matter of logical necessity, so the Court might do complete justice in a dispute that *is* properly before it. *Freeman* v *Howe*, 24 How. 450 (1860). *See* 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §3523, at 58-59. Despite expansionist views of "the doctrine" of pendant and ancillary jurisdiction predicated upon extra-Constitutional notions of "judicial economy,"[5] this Court's latest excursions into the area aptly demonstrate that both the Constitutional and statutory limitations upon federal jurisdiction are imperatives in considering exercises of "ancillary jurisdiction." *Owen Equip. & Erec. Co.* v *Kroger*, 437 US 365, 371-72 (1978); *Aldinger* v *Howard*, 427 US 1, 16-17 (1976). The Eleventh Circuit most recently expressed this idea in a case where the claims over which ancillary jurisdiction had erroneously been asserted, had already been tried:

> Judicial economy also does not demand the exercise of jurisdiction in this instance simply because the parties already have tried the case. Although to decide the case at this point would avoid the time and effort of an identical trial in state court, such an exercise of jurisdiction would prove contrary to the jurisdictional limitations of federal tribunals. Unlike state courts, which are courts of general jurisdiction, federal courts are constrained by both the Constitution and the enactments of Congress. See *Owen*, 437 U.S. at 372, 98 S.Ct. at 2401; *Aldinger* v *Howard*, 427 U.S. 1, 16-17, 96 S.Ct. 2413, 2421-2422, 49 L.Ed.2d 276 (1976). Neither the conven-

[5]"It has been stated that the doctrine of ancillary jurisdiction is the child of necessity and the sire of confusion. Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Court 33, F.R.D. 27 (1964) (citing, Note, 11 Okla. L. Rev. 326, 329 (1958)). After considerable research and study, we agree." *McDonald* v *Oliver*, 642 F.2d 169, 172 n.4 (5th Cir. 1981).

> ience of the litigants nor general considerations of judicial economy are sufficient to oversome these limitations. 437 U.S. at 15, 96 S.Ct. at 2420; *see Mansfield, C. & L.M. Ry.* v *Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Eagerton v *Valuations, Inc.*, 698 F.2d 1115, 1120 (11th Cir. 1983).

Notwithstanding these principles of limitation, the District Court, as sustained by the Sixth Circuit, extended the concept of federal ancillary jurisdiction (born of necessity) to adjudicate this tangentially related cross-claim involving alien persons and alien laws. Factually, it cannot be rebutted or rebuffed that the foreign installment contract dispute need not have been resolved in order to resolve the preferred shareholders' action for alleged securities violations relative to their dividends.[6] The cross-claim was concedely "permissive" in that sense. Nevertheless, the Sixth Circuit held there need only exist a "logical relationship" between the two claims for "ancillary jurisdiction" to exist over the alien contract claim. Moreover, it did this without even addressing the fact that this "Flying Dutchman" of a cross-claim, drifting in "jurisdictional limbo," [*Joiner* v *Diamond M. Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir. 1982)], was being adjudicated *after* the *claims* which *did* bestow federal jurisdiction were resolved and dismissed! It is respectfully submitted that the Sixth Circuit's sweepingly broad test of "logical relationship," as applied to a residual cross-claim involving a tangential dispute between aliens, runs contrary to the imperative principles of limitation upon federal jurisdiction announced by this Court.

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[6]The Plaintiffs only needed to show, in the securities action, the ownership of the stock by the Respondent and the Petitioner. At most, the occurrence of *the sale* by Respondent to Petitioner (if that) was at issue. Certainly, the terms, conditions, place of execution, understanding of the parties, payment, etc., regarding that sale agreement was *not* at issue in the main claim.

II

THE "LOGICAL RELATIONSHIP" TEST FOR EXERCISE OF FEDERAL ANCILLARY JURISDICTION OVER THE CROSS-CLAIM IN THIS CASE, AS ARTICULATED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, IS IN DIRECT CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS.

The Sixth Circuit began its jurisdictional analysis with a reference to Fed. R. Civ. P. 13(g), stating that if that Rule was satisfied as to whether a cross-claim could be asserted thereunder, then ancillary jurisdiction existed to adjudicate it. (Appendix, pp. 2a-3a). This was a somewhat inartful statement "since it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erec., Co.* v *Kroger*, 437 US at 370 & n.7 *citing* Fed. R. Civ. P. 82. Nevertheless and in fairness to the Sixth Circuit, the Courts of Appeals have generally agreed that it is not critical to ascertain whether a claim is proper under Rule 13(g) or supported by ancillary jurisdiction since "[t]he analysis is substantially the same". *Travelers Ins. Co.* v *First Nat'l Bank of Shreveport*, 675 F.2d 633, 638 (5th Cir. 1982). Where the Sixth and the Fifth and Eleventh Circuits have differed is with regard to those substantive criteria that are determinative of the existence of a proper cross-claim and the methodology by which those criteria are applied to a given fact pattern.

The Fifth and Eleventh Circuit decisions addressing the propriety of a given permissive cross, counter, third party or interpleader claim unsupported by independent jurisdiction, have viewed the problem with the constitutional and congressional limitations upon federal jurisdiction explicitly in mind. *See, e.g., Eagerton* v *Valuations, Inc.*, 698 F.2d 1115, 1118-19 (11th Cir. 1983); *Waste Systems, Inc.* v *Clean Land Air Water Corp.*, 683 F.2d 927, 930-31 (5th Cir. 1982); *Joiner* v *Diamond*

M. Drilling Co., 677 F.2d 1035, 1041-44 (5th Cir. 1982); *Travelers Ins. Co.* v *First Nat'l Bank of Shreveport*, 675 F.2d 633, 640-41 (5th Cir. 1982); *Amco Const. Co.* v *Mississippi State Building Comm'n*, 602 F.2d 730, 732-33 (5th Cir. 1979). *See also Cenco Inc.* v *Seidman & Seidman*, 686 F.2d 449, 452, 458-59 (7th Cir.), *cert. denied*, 103 S.Ct. 177 (1982); *Gus T. Handge & Son Painting Co.* v *Douglass State Bank*, 543 F.Supp. 374, 376-80 (D. Kan. 1982). *Cf. also*, relative to 'pendant party jurisdiction' *Weinberger* v *Kendrick*, 698 F.2d 61, 76-77 (2d Cir. 1982); *Safeco Ins. Co.* v *Guyton*, 692 F.2d 551, 555-56 (9th Cir. 1982); *Williams* v *Bennett*, 689 F.2d 1370, 1379 (11th Cir. 1982). Correspondingly, the Sixth Circuit decisions turn primarily, if not solely upon the Court's own expansive view of whether there has been satisfaction of the rules of procedure relative to permissive incidental claims, in this instance a cross-claim, with little more than an acknowledgement (if that) of the more fundamental ramifications of, and nuances relative to an exercise of limited federal court jurisdiction. *See, e.g.*, Appendix, p. 3a; *Coleman* v *Casey County Bd. of Educ.*, 686 F.2d 428, 429-30 (6th Cir. 1982); *Lasa Per L'Industria Del Marmo Societa Per Azioni* v *Alexander*, 414 F.2d 143 (6th Cir. 1969).

More particularly and relative to ancillary jurisdiction over cross-claims, the Sixth Circuit has interpreted the words of Rule 13(g), "arising out of the same transaction or occurrence that is the subject matter either of the original action or of a counter claim therein," to mean there need only exist a "logical relationship" between the cross and main claim. This alone is not objectionable in that even the Circuits strictly construing the exercise of ancillary jurisdiction over such claims have, at times, expressed their jurisdictional analyses in terms of this "logical relationship" characterization (although they usually speak of "logical dependence"). *See Eagerton* v *Valuations, Inc.*, 698 F.2d at 1119-20, *Travelers Inc. Co.* v *First Nat'l Bank of Shreveport*, 675 F.2d at 637-40. Where the Fifth and Eleventh

Circuits do differ from the the Sixth, and what *does* make the Sixth Circuit's approach objectionable, is the respective *substantive* definitions given to the phrase and the minimal factual indicia that must be present to create this telic relationship between the claims that is rendered, talismanically, "logical."

The Sixth Circuit definition would appear to be, by far, the most simplistic. In essence, there is no definition, nor has there been any attempt at articulating one. "Logical relationship" is ascertained on an *ad hoc* basis, contingent only upon a given panel's subjective rendition of when the claim unsupported by jurisdiction is, in their estimation, related "in logic" to a claim that is jurisdictionally supported. *See* Appendix, p. 3a; *Coleman* v *Casey County Bd. of Education*, 686 F.2d at 429-30. Such an approach is unacceptable in a system of predictable laws, not of men. *See generally Federman* v *Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 812 n.21 (2d Cir. 1979); 6 Wright & Miller, *Federal Practice & Procedure: Civil* §1410. It is particularly unacceptable in a jurisdictional inquiry, a question going to the very competence and ability of the judges rendering decision to entertain the dispute before them. This subjective and ad hoc methodology predictably leads to an expansive and overly broad understanding of federal jurisdiction, often predicated upon what should be irrelevant or marginally significant factors of "equity," "convenience" or "judicial economy" especially inappropriate in jurisdictional inquiries. *See Owen Elec. & Erec. Co.* v *Kroger*, 437 U'S at 372; *Mansfield, C. & L. M. Ry.* v *Swan*, 111 U'S 379, 382 (1884). Petitioner submits that the decision of the Sixth Circuit Court of Appeals in this case evidences just such an elusive exercise of an ad hoc subjectivism founded upon an unarticulated, if not unconscious notion of judicial economy: a notion to "mop up" the "straggler" cross-claim.

In sharp contrast are the detailed attempts of the Fifth and Eleventh Circuits to give an objective definition to "logical dependence" or "logical relationship." As those Courts have

repeatedly asserted in relation to cross-claims, ancillary jurisdiction *operates only* "when there is a *tight nexus* with a subject matter properly in federal court." *Eagerton* v *Valuations, Inc.* 698 F.2d at 1119; *Amco Const. Co.* v *Mississippi State Building. Comm'n*, 602 F.2d at 733; *Warren G. Kleban Engineering Corp.* v *Calduell*, 490 F.2d 800, 802 (5th Cir. 1974) (emphasis supplied). In fact, they have further refined and explicated the parameters of the definition by stating that such a nexus or logical relationship arises only when either the same *aggregate* of operative facts serves as the basis for both claims or when the core of facts supporting the orgical claim activates legal rights in favor of a party Defendant that would otherwise remain dormant. *Eagerton* v *Valuations, Inc.*, 698 F.2d at 1119; *Revere Cooper & Brass Inc.* v *Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970).[7]

Moreover, this Court's decision in *Owen Equip.* sustained the rationale of those cases' definitions since it tied the exercise of ancillary jurisdiction, at least in the diversity context, to more than the existence of a "common nucleus of operative facts"[8]; it also required the claims be not merely '*factually sim-*

[7]In this case, neither condition is met. First, the existence, terms and performance of the installment contract formed only an incidental (if any) portion of the preferred shareholders' dividend main claims, hardly the *aggregate* of operative facts to prove those claims. Secondly, the shareholders' action did not activate the cross-claim nor was it dormant prior to the institution of the main action. Indeed, the legal rights existing relative to the contract that is the subject of the cross-claim *antedated* the main action!

[8]Petitioner would note that even under this minimal constitutional criterion, the cross-claim and main claims involved *sub judice* do not arise under such a "common nucleus." Rather, there are two distinct and respective "nuclei of fact." One is centered about a contract between two aliens that was negotiated and executed *in Saudi Arabia in 1976*, concerning a purchase of *common shares* in the Bank. The other involves a *preferred* shareholders' action alleging a violation of securities laws due to their failure to obtain proper dividends, partly as a result of a *1977* reorganization of the Bank. The purchase of the common stock formed only *one* of many factual occurrences constituting the reorganization and therefore rendered, at best, the two "nuclei of fact" as intersecting ones. In no event were they "common" or "equivalent."

ilar but logically dependent' as well. *Owen Equip. & Erec.* v *Kroger*, 437 US at 372-73, 376.[9] Subsequent to *Owen Equip.*, the decisions from the Fifth and Eleventh Circuits extrapolate upon it and the ground work laid in the earlier and harmonious Fifth Circuit decisions, by stating that a claim was not ancillary to a main claim unless together they "constitute an "entire, *logically* [emphasis in original] entwined lawsuit." . . . [not merely] a series of "independent and separate" claims, *albeit ones involving the same central factual inquiry.*" *See, e.g., Travelers Ins. Co.* v *First Nat'l Bank of Shreveport*, 675 F.2d at 640 (emphasis supplied).

Certainly, under these criteria to establish "logical dependence or relationship" the cross-claim on the installment contract here cannot be considered so tied to the preferred shareholders' action. The most fitting description of this purported cross-claim is that given by the Fifth Circuit to the attempt at

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[9]The *Owen Equip.* case gave as an example of "logical dependence" between an original claim supported by independent jurisdiction and an ancillary claim, the impleading by a Defendant of a third-party Defendant. *Owen Equip. & Erec.* v *Kroger*, 437 US at 376. The Court stated such a third party claim "*depends at least in part upon the resolution of the primary lawsuit.*" *Id.* (emphasis supplied). "Its [the third-party complaint of a defendant] relation to the original complaint is thus not mere factual similarity but logical dependence." *Id.* It is apparent that "logical dependence", as expresed by this Court in *Owen Equip.*, is *not* present in this case, if only because the cross-claim was resolved without resolution of the primary suit. Even if the main claims here had not been settled, Respondent has never contended (nor could it contend) that it could not litigate the installment contract without first resolving the preferred shareholders' claims. The cross-claim would (and should) be litigated alone in Saudia Arabia or Luxembourg. At the very most, resolution of a portion of the contract claim (i.e. to determine who were proper Defendants) *might* have been necessary to resolve the shareholders' claims, however, that puts the jurisdictional cart before the horse. It is presuppositional that ancillary jurisdiction cannot 'work in reverse' to bootstrap unjusticable claims into federal court. *See Corporacion Venezolana de Fomento* v *Vintero Sales Corp.*, 629 F.2d 786 (2d Cir.), *cert. denied*, 449 US 1080 (1980); 13 Wright, Miller & Cooper, *Federal Practices & Procedure: Civil* §3523, at 58 n.2 (1971 & Cumm. Supp. 1982).

cross-claim involved in *Amco Const. Co.* v *Mississippi State Building Comm'n*, 602 F.2d at 733:

> It would not have been necessary to decide the proposed cross claim to protect the integrity of the original claim or to insure that the disposition of the original claim would not have been frustrated. Amco's proposed cross claim stands apart; it is a cause of action wholly independent and separate.[10]

The foregoing demonstrates the radically different, and inconsistent orientations the Courts of Appeals have developed relative to ascertaining when a proper Rule 13(g) cross-claim exists warranting an exercise of ancillary federal jurisdiction. Only this Court can resolve that split of authority, and this case squarely presents it with the opportunity to do so. Moreover, the approach adopted by the Sixth Circuit so overlooks and negates by implication the fundamental understanding of federal jurisdiction as limited jurisdiction, as to necessitate this Court reiterating that fundamental. It also, simultaneously, permits the Court to supplement *Owen Equip.* relative to particulars of ancillary jurisdiction that it has not yet addressed but which are in contention here.

III

ASSUMING *ARGUENDO* ANCILLARY JURISDICTION EXISTED WHEN THE PURPORTED CROSS CLAIM WAS ASSERTED, THIS COURT HAS NEVER ADDRESSED WHETHER SUBSEQUENT TO DISMISSAL OF THE MAIN CLAIMS THE INCIDENTAL CLAIM MUST BE DISMISSED.

The main claims in this case were dismissed pursuant to

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[10]*See also Federman* v *Empire Fire & Marine Ins. Co.*, 597 F.2d at 813; *Gus T. Handge & Son Painting Co.* v *Douglass State Bank*, 543 F.Supp. 374 (D. Kan. 1982); *Federal Republic of Germany* v *Elicofon*, 536 F.Supp. 813, 824 (E.D. N.Y. 1978), *aff'd sub. nom., Kunstsammlungen Zu Weimar* v *Elicofon*, 678 F.2d 1150 (2d Cir. 1982), for cases denying ancillary jurisdiction relative to purported cross-claims factually analogous to this one.

settlement when the purported cross-claim, asserted well after the pleading and well into the discovery stage of the case, was in its infancy. Nevertheless, the District Court not only continued to entertain it but resolved it summarily. This fact alone renders the case ripe for the Court to address important and subsumed questions it has yet to consider: whether the dismissal of a main claim prior to trial mandates dismissal of an ancillary or pendent claim, and if not, what particular parameters exist upon the District Court's discretion to allow it to continue. 6 Wright & Miller, *Federal Practice & Procedure: Civil* §1433, at 181. *See also Waste Systems, Inc.* v *Clean Land Air Water Corp.*, 683 F.2d 927, 930 (5th Cir. 1982).
(5th Cir. 1982).

Relying upon the statement, "if the federal claims are dismissed before trial, the state claims should be dismissed as well" appearing in *United Mine Workers* v *Gibbs*, 383 U.S. 715, 726 (1966), the Courts of Appeals have, for the most part, held that "[g]enerally, when the primary federal claim has been settled or dismissed before trial, the District Court should dismiss any lingering ancillary state law claims." *See, e.g., Joiner* v *Diamond M. Drilling Co.*, 677 F.2d at 1041.[11] A few have rejected

[11] *See also Ceneo Inc.* v *Seidman & Seidman*, 686 F.2d 449, 452, 458 (7th Cir., *cert. denied*, 103 S.Ct. 177 (1982) ("[t]he rule in pendent jurisdiction is that if the federal claim to which the state-law claim is pendent is dismissed before trial, the court will decline jurisdiction over the state law claim and remit the claimant to the state courts"); *Waste Systems, Inc.* v *Clean Air Land Water Corp.*, 683 F.2d at 930 & n.6; *Putnam* v *Williams*, 652 F.2d 497, 502 (5th Cir. 1981) (dicta) (". . . the preferred practice, when no extensive proceedings on the ancillary claim have begun in federal court, is to dismiss . . . [the state-law claim] so that the case may be brought in state court where it belongs."); *McDonald* v *Oliver*, 642 F.2d 169, 172 (5th Cir. 1981) (the district court "lost its ancillary jurisdiction when the underlying lawsuit was dismissed."); *Tinker* v *DeMaria Porsche-Audi, Inc.*, 632 F.2d 520, 523 (5th Cir. 1980) ("[I]f the federal claims are dismissed before trial . . . the state claim should be dismissed as well."); *Federman* v *Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 811 (2d Cir. 1979) (settlement of main federal claim prior to trial necessitates dismissal of state law claims); *Propps* v *Weihe, Black & Jeffries*, 582 F.2d 1354, 1356 (4th Cir. 1978) (district court acted properly in dismissing ancillary third-party claims when main fed-

such reasoning on "judicial economy" grounds,[12] and therefore create a discrepancy in the Circuit decisions on the point which only this Court can resolve.[13]

Moreover, a third category of decisions appear to adopt an intermediate position which recognize that the ancillary claims generally should be dismissed after dismissal of the main claim but which nevertheless acknowledge that there may be extraordinary circumstances warranting a federal court to continue to entertain the solitary claim as a matter of discretion. *See, e.g., Joiner* v *Diamond M. Drilling Co.*, 677 F.2d at 1041. *But see, Cenco Inc.* v *Seiderman & Seiderman*, 686 F.2d at 452 (which applies such a principle to an exercise of jurisdiction over ancillary claims surviving dismissal of the main claims *only if*

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eral action was settled prior to trial); *Rosario* v *American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1233 n.17 (3d Cir. 1976) (dicta) (where seaman's claim against shipowner is settled prior to trial, ancillary state-law claim against hospital should also be dismissed); 6 Wright & Miller, *Federal Practice Procedure: Civil* §1444, at 237; Note, *Ancillary Jurisdiction Rule 14 — Disposition of Third Party Claim When the Primary Claim Has Been Dismissed*, 23 S. Car. L. Rev. 261, 267 (1971).

[12]*Compare Fairview Park Excavating Co.* v *Al Monzo Constr. Co.*, 560 F.2d 1122, 1125 (3d Cir. 1977) ("once a district court judge has properly permitted a cross-claim under F. R. Civ. P. 13(g) . . . the ancillary jurisdiction that results should not be defeated by a decision on the merits adverse to the plaintiff on the plaintiff's primary claim") *and Parris* v *St. Johnsbury Trucking, Co.*, 395 F.2d 543, 544 (2d Cir. 1968) (ancillary jurisdiction over cross-claims between non-diverse parties exists since diversity does exist with respect to the main claim which was settled during trial) *and Atlantic Corp.* v *United States*, 311 F.2d 907, 910 (1st Cir. 1962) ("If . . . [the defendant] had a proper cross-claim against its co-defendants this gave the court ancillary jurisdiction even though all the parties to the cross-claim were citizens of the same state. . . . The termination of the original action would not affect this.") *with* cases cited in note 11 *supra*. *See also Stamford Bd of Educ.* v *Stamford Educ. Ass'n*, 697 F.2d 70, 72 & n.3 (2d Cir. 1982).

[13]Petitioner cannot refer this Court to any survey or statistical evidence, but it is respectfully suggested that a significant number of attorneys and judges in the federal court system are of an opinion contrary to the above quoted excerpt from *Gibbs, supra*; namely that there is a preference for "cleaning up" ancillary state court claims rather than dismissing them.

they *have already been tried)*. Implicit in this approach, however, is the recognition that the idea of "discretionary jurisdiction" is one that is at best attentuated, if not "illogical *per se*," and accordingly the "discretion" is expressly characterized as "limited." *See, e.g., Joiner* v *Diamond M. Drilling Co.*, 677 F.2d at 1042 & n.19. Considerations of judicial efficiency and economy no longer will justify an exercise of federal jurisdiction under such circumstances, simply because the only claims with which the District Court could properly be concerned in resolving "efficiently and economically" (the main claims) have already been resolved. *Id.* at 1042-43. "Judicial poaching" of state law claims and issues militate in favor of dismissal in view of considerations of comity and federalism, particularly when the state issues are complex or unresolved (not to mention issues of foreign law such as are involved here). *Id.* at 1043-44; *Waste Systems*, Inc. v *Clean Land Air Water Corp.*, 683 F.2d at 931.

Put as succinctly as possible by the Fifth Circuit, "if the federal claim is dismissed *prior to trial*, there is a strong presumption in favor of dismissing any lingering ancillary state-law claims." *Joiner* v *Diamond M. Drilling Co.*, 677 F.2d at 1044. Not only was such a presumption not applied by the Sixth Circuit in this case, where each of the noted considerations pointed toward dismissal, but the fact that the dismissal of the main claims antedated the resolution of the cross-claim was not even mentioned or considered by the Court! Certainly such an expansive exercise of "discretionary jurisdiction" cannot be tolerated by this Court, even if otherwise allowed.

CONCLUSION AND PRAYER FOR RELIEF

In view of the foregoing, Petitioner prays this Court to issue its Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit to review its Order affirming the District Court's denial of Petitioner's Motion to Dismiss and entry of Summary Judgment in favor of Respondent.

RESPECTFULLY SUBMITTED,

BUSHNELL, GAGE, DOCTOROFF
& REIZEN

By: _____
GEORGE E. BUSHNELL, JR. (P11472)

By: _____
CARL J. MARLINGA (P17102)

By: _____
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90 Park Avenue
New York, New York

DATED: July 20, 1983

I

INDEX TO APPENDIX TO PETITION FOR CERTIORARI

No. 82-1209
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELI BROAD and DONALD KAUFMAN,
Plaintiffs,

vs.

JAMES T. BARNES, SR., et al.,
Defendants,

GHAITH R. PHARAON,
Defendant,
Cross Plaintiff,
Appellee,

vs.

THE FIRST ARABIAN CORPORATION,
Defendant,
Cross Defendant,
Appellant.

ORDER
(Filed May 3, 1983)

Before: MARTIN and CONTIE, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

First Arabian Corporation appeals from the district court's denial of First Arabian's motion to dismiss Pharaon's cross-claim, the denial of First Arabian's motion to amend its answer to the cross-claim, and the granting of Pharaon's motion for summary judgment on his cross-claim. We affirm.

The plaintiffs in this case, Broad and Kaufman, were former owners of preferred stock in the Bank of the Commonwealth (BOC) in Detroit. They sold their stock to James Barnes, Sr. and James Barnes, Jr. (the "Barnes") but allegedly retained certain preferred rights in BOC stock. The Barnes then sold the stock to Pharaon who in turn sold it to First Arabian on

November 12, 1976. First Arabian assumed Pharaon's obligation to pay the Barnes in annual installments of $750,000. On December 21, 1976, BOC stockholders approved a recapitalization plan which allegedly extinguished the preferred rights of Broad and Kaufman. In early 1977, the recapitalization was accomplished and the sale of BOC stock to First Arabian by Pharaon was officially completed. On June 30, 1977, Broad and Kaufman sued the Barnes, Pharaon and First Arabian for conspiring to deprive them of their preferred rights. The plaintiffs apparently viewed the successive sales of BOC stock as related steps in a fraudulent scheme. After the filing of the 1977 suit, First Arabian made two more annual installment payments to the Barnes. In February 1980, however, First Arabian refused to make the final payment. Pharaon paid the Barnes and unsuccessfully sought reimbursement from First Arabian.

In March 1980, the district court granted Pharaon's motion for leave to file his cross-claim against First Arabian. The motion was unopposed. First Arabian's answer to the cross-claim did not challenge the district court's jurisdiction nor did it raise any defenses other than a broad assertion that it refused to pay because the Broad and Kaufman suit may have affected its obligation. In November 1980, Pharaon moved for summary judgment on his cross-claim. In January 1981, a week after the summary judgment response was due, First Arabian filed a motion to dismiss the cross-claim for lack of jurisdiction. Also, First Arabian made a motion to amend its answer to the cross-claim in order to assert an affirmative defense. All of the motions regarding the cross-claim were argued in October 1981. At this time, only the cross-claim was in issue because all other claims had been settled. The district court denied both of First Arabian's motions and granted Pharaon's motion for summary judgment.

On appeal, First Arabian initially contends that the district court erred in finding that it had ancillary jurisdiction over the cross-claim. The parties agree that if Pharaon's cross-claim

satisfied Rule 13(g) of the Federal Rules of Civil Procedure, the district court properly asserted ancillary jurisdiction over the claim. *See Coleman* v. *Casey County Bd. of Education*, 686 F.2d 428, 430 (6th Cir. 1982). Rule 13(g) provides in part that "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action . . . ."

First Arabian contends that the cross-claim was only collaterally related to the original action and thus did not arise out of the same transaction or occurrence. Under First Arabian's analysis, the cross-claim is a simple contract action which has no connection with the original claim except that both involve BOC stock. First Arabian further asserts that no proof essential to one claim is also required to prove the other. We disagree.

This circuit follows the "logical relationship" test in applying Rule 13(g). *Lasa Per L'Industrial Del Marmo Societa Per Azioni of Lasa, Italy* v. *Alexander*, 414 F.2d 143, 147 (6th Cir. 1969). In this case, we agree with the district court's conclusion that there was a logical relationship between the cross-claim and the original claim made by Broad and Kaufman. Both claims involved BOC stock and the sale of that stock by Pharaon to First Arabian was involved in both claims. The same factual background was necessary to resolve both claims. Finally, we note that First Arabian's sole defense to the cross-claim involved the original suit. Under these circumstances, the district court properly asserted ancillary jurisdiction over the cross-claim.

First Arabian's second argument on appeal is that the district court erred in denying its motion to amend its answer to the counterclaim. It is undisputed that Pharaon's summary judgment motion was valid unless First Arabian's motion to amend its answer was allowed.

In general, leave to amend should be granted unless allowing the amendment would result in substantial prejudice to the opposing party. *Hageman* v. *Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973). "Delay by itself is not sufficient reason to deny a motion to amend." *Id.* One basis for denying a motion for leave to amend is that the new defense proposed in the amendment is frivolous or based on legally insufficient grounds. *Banque de Depots* v. *National Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974).

The district court found that allowing the amendment would prejudice Pharaon due to having to defend against a legally doubtful defense after a substantial delay. We agree. First Arabian's new defense was that Pharaon had defrauded it by withholding information as to the financial condition of the BOC. It contends that such information should have been disclosed in early 1976 when Pharaon orally agreed to sell the stock. However, by the time that the sale was officially closed in early 1977, First Arabian controlled the BOC and clearly had access to all financial information. Furthermore, we note that First Arabian did not raise this defense until 1981, long after it knew or should have known of Pharaon's alleged fraud. We find that the district court did not abuse its discretion in denying leave to amend.

Accordingly, the district court's judgment is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Heleman

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELI BROAD and DONALD KAUFMAN

Plaintiff,

v

CIVIL ACTION
No. 77-72757

JAMES T. BARNES, SR., JAMES T. BARNES, JR., GHAITH R. PHARAON, and THE FIRST ARABIAN CORPORATION, S.A., jointly and severally,

Defendant.

MEMORANDUM AND ORDER
DENYING CROSS DEFENDANT FIRST ARABIAN'S
MOTION FOR REHEARING

Cross-defendant First Arabian's motion for rehearing of this Court's denial of its motion to amend its answer and the grant of cross-plaintiff Ghaith Pharaon's motion for summary judgment came on to be heard on March 5, 1982.

It appears that there is no good reason to alter this Court's order of November 10, 1981. Therefore cross-defendant First Arabian's motion for rehearing must be denied.

Documents in the possession of First Arabian contained obvious information as to the financial status of the Bank of the Commonwealth. Thus, prior to the closing in January 1977, and prior to the execution of a new stock purchase agreement in November 1976, First Arabian had sufficient information as to the condition of the Bank.

In choosing to complete the transaction, First Arabian waived any objections it may have had as to the nature of its

dealings with Pharaon in late December 1975 or early January 1976. First Arabian clearly had access to the Board of the Bank of the Commonwealth, and First Arabian placed its nominee on the Board well in advance of the closing in January 1977. First Arabian's amended answer is therefore of doubtful legal sufficiency.

This Court is persuaded that First Arabian's motion to amend its answer was properly denied. In seeking amendment, First Arabian sought to establish a fraud or misrepresentation defense to Pharaon's summary judgment motion. The Court finds the prayed-for amendment of doubtful legal sufficiency, and further finds that amendment at this late date would cause cross-plaintiff Pharaon substantial prejudice, and materially delay the ultimate resolution of this case. *Foman* v. *Davis*, 371 U.S. 178, 9 L.Ed. 2d 222 (1962).

For all of the aforementioned reasons, IT IS ORDERED that the motion for rehearing be, and the same hereby is, DENIED.

HORACE W. GILMORE
United States District Judge

DATED: March 9, 1982
(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
By: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
802 U.S. COURTHOUSE
DETROIT, MICHIGAN 48226

December 7, 1981

Chambers of
HORACE W. GILMORE
District Judge

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Detroit, MI 48226

Re: Broad and Kaufman v. Barnes, et al.
Civil Action No. 77-72757

Gentlemen:

Defendant First Arabian's motion for reconsideration of its motion to dismiss for lack of jurisdiction has been considered. The motion for reconsideration is denied.

Yours very sincerely,
/s/ HORACE W. GILMORE
United States District Judge

HWG:mp

(Title of Court and Cause)

FINAL JUDGMENT AND ORDER GRANTING PHARAON'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the Federal Building, in the City of Detroit, County of Wayne, on November 10, 1981.

PRESENT: The Honorable Horace W. Gilmore, U.S. District Judge.

Defendant Ghaith R. Pharaon, having filed his Motion for Summary Judgment dated November 20, 1980, and

The Court having reviewed the briefs filed by the parties, and

The Court having heard oral arguments on the motion on October 22, 1981,

NOW THEREFORE, IT IS HEREBY ORDERED that the Motion for Summary Judgment be, and it hereby is granted.

IT IS FURTHER ORDERED that final judgment is hereby entered in favor of Defendant PHARAON and against Defendant THE FIRST ARABIAN CORPORATION, S.A. in the amount of $854,913 (consisting of $750,000 and statutory interest thereon from February 13, 1980 to May 31, 1981 in the amount of $104,913) plus statutory interest thereon at the rate of 12% per year, compounded annually, from June 1, 1981 until the judgment is paid.

/s/ HORACE W. GILMORE
U.S. District Judge

APPROVED AS TO FORM ONLY:
/s/ CARL J. MARLINGA
(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
BY: /s/
Deputy Clerk

(Title of Court and Cause)

ORDER DENYING FIRST
ARABIAN'S MOTION TO DISMISS

At a session of said Court, held in the Federal Building, in the City of Detroit, County of Wayne, on November 12, 1981.

PRESENT: The Honorable Horace W. Gilmore, U.S. District Judge.

Defendant The First Arabian Corporation, having filed its motion, entitled "Motion of Cross-Defendant, The First Arabian Corporation, S.A. To Dismiss The First Cross-Claim Of Defendant Ghaith Pharaon For Lack Of Subject Matter Jurisdiction" dated January 5, 1981, and

The Court having reviewed the briefs filed by the parties, and

The Court having heard oral arguments on the motion on October 22, 1981,

NOW THEREFORE, IT IS HEREBY ORDERED that the Motion To Dismiss be, and hereby is denied.

/s/ HORACE W. GILMORE
U.S. District Judge

APPROVED AS TO FORM ONLY:
/s/ CARL J. MARLINGA
(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
BY: /s/
Deputy Clerk

(Title of Court and Cause)

ORDER DENYING FIRST ARABIAN'S
MOTION FOR LEAVE TO AMEND

At a session of said Court, held in the Federal Building, in the City of Detroit, County of Wayne, on November 12, 1981.

PRESENT: The Honorable Horace W. Gilmore, U.S. District Judge.

Defendant The First Arabian Corporation, having filed its motion entitled "Motion To Permit The First Arabian Corporation, S.A. To File First Amended Answer And Cross-Claim" dated January 6, 1981, and

The Court having reviewed the briefs filed by the parties, and

The Court having heard oral arguments on the motion on October 22, 1981,

NOW THEREFORE, IT IS HEREBY ORDERED that the Motion For Leave To Amend be, and it hereby is denied.

/s/ HORACE W. GILMORE
U.S. District Judge

APPROVED AS TO FORM ONLY:
/s/ CARL J. MARLINGA
(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
BY: /s/
Deputy Clerk

(Title of Court and Cause)

BEFORE THE HONORABLE HORACE W. GILMORE

Detroit, Michigan — Thursday, October 22, 1981

APPEARANCES:

Mr. Wolfgang Hoppe

Appearing on behalf of the Defendant Pharaon

Mr. Carl Marlinga

Appearing on behalf of the Defendant The First Arabian Corporation

REPORTED BY:

Elizabeth A. Higdon

Official Court Reporter

(Tr-2)

Detroit, Michigan

Thursday, October 22, 1981

THE COURT: Broad versus Barnes.

MR. MARLINGA: For the record, my name is Carl Marlinga from the firm of Bushnell, Gage, Doctoroff, Reizen & Byington.

As an introductory matter, I believe there are three motions before the Court.

THE COURT: The Plaintiff has filed a motion for summary judgment, you have filed a motion to amend your Answer, and you filed a motion to dismiss for lack of jurisdiction.

MR. MARLINGA: That is correct, your Honor.

THE COURT: Let's take any one you want to. It's been a long day. Please remember that as you argue.

MR. MARLINGA: Mr. Hoppe suggested that we take the jurisdictional motion first since that might dispose —

THE COURT: (Interposing) That's his motion.

MR. MARLINGA: Oh, excuse me. We are both Defendants in the original action.

(Tr-3)

THE COURT: I know that. Who do you represent?

MR. MARLINGA: First Arabian.

THE COURT: You represent First Arabian. I am sorry. Mr. Hoppe represents Pharaon, right?

MR. HOPPE: That is correct, your Honor.

THE COURT: I want to be sure who is who.

Go ahead. You have got two motions, you have got the motion to dismiss and leave to amend.

MR. MARLINGA: On the jurisdictional matter, the situation before the Court is that you have a citizen of Saudi Arabia as a cross-plaintiff as a Defendant.

THE COURT: The original case was gone and we have this ancillary proceeding between you and Pharaon. What you are saying is the original case having been disposed of, I should dump this one.

MR. MARLINGA: That is exactly it, and I was just going to point out —

THE COURT: (Interposing) Why should I dump it? Someone is going to start it all over again. It is going to be litigaged. (Tr-4)

MR. MARLINGA: Well, it ought to be litigated in a Court that has jurisdiction over the matter.

THE COURT: Why don't I have jurisdiction, having jurisdiction over the original cause of action?

MR. MARLINGA: It is a Federal Court having limited jurisdiction, and there is no federal claim being asserted. The claims that were originally asserted were proper if ancillary to that cause of action.

THE COURT: It was ancillary to it, wasn't it?

MR. MARLINGA: Yes, but the claims were permissive in that they were not necessarily tied up with a determination of the original suit by Broad and Kaufman against Barnes.

THE COURT: How do you deal with — I hate to keep interrupting you; I want to zero right in — how do you deal with what Moore's says, pretty good authority,

> "In the compulsory counterclaim cases, however, where the original bill was dismissed on the merits or

the opposing party did not proceed to hearing on his bill, jurisdiction over the counterclaim was sustained even though independent jurisdictional facts did not exist

(Tr-5)

for its support. These same principles should apply to sustain jurisdiction over the cross claim under similar circumstances, even though the cross claim is permissive, since there is jurisdiction over the main action and the cross claim is auxiliary or related to the main action. The question should be considered one of discretionary pendent jurisdiction."

MR. MARLINGA: Okay.

THE COURT: That is pretty good authority, isn't it?

MR. MARLINGA: That is right, your Honor, so we get down to an exercise of discretion, and that is the point that we rely on.

THE COURT: Why should I exercise my discretion to throw Mr. Hoppe out?

MR. MARLINGA: Because this matter could be litigaged in any State Court. Most importantly, it might even be more proper to be litigated in a Court in Luxembourg or Saudi Arabia because you have two people that are strangers to the State of Michigan in this Court.

THE COURT: I was going to say you could say any State Court. If this matter were — if he started a suit against you in Wayne County Circuit Court, I think you would be in there

(Tr-6)

screaming he had no jurisdiction over you, wouldn't you? Not screaming, I realize, but you wold be arguing that they had no jurisdiction.

MR. MARLINGA: We could take that position, your Honor, but Wayne County is not the premiere Court in the entire world to try a case.

THE COURT: How about the Supreme Court of New York or the Common Pleas Court of Ohio? You name your

state. Anyplace you go into you are going to say no jurisdiction, aren't you?

MR. MARLINGA: No, your Honor. I would think that jurisdiction would exist in any Court of proper jurisdiction in Luxembourg or in Jeddah, Saudi Arabia, where the contract was negotiated and entered into. There are plenty of places.

THE COURT: I believe there is jurisdiction properly in Luxembourg or Saudi Arabia, but why should I exercise my discretion now? Why should I say to Mr. Hoppe, "Go to Saudi Arabia and file your lawsuit?"

MR. MARLINGA: Because you are not telling Mr. Hoppe, you are telling Dr. Pharaon, who is a resident of Saudi Arabia. It is a breach of contract action. When we get into this, it may be that the law of Saudi Arabia should apply to this (Tr-7)
transaction because of where it was negotiated.

THE COURT: Perhaps we would all learn a little bit about the law of Saudi Arabia.

MR. MARLINGA: What better place to apply the law of Saudi Arabia than in Jeddah, Saudi Arabia, or in Luxembourg. That is basically our argument, your Honor.

The case started out in California. It was brought here because of the other parties in the lawsuit. Now all that is shaken out. You are left with people who are strangers to the State of Michigan. Mr. Hoppe and I both benefit from litigating the matter here because it is business to us, but aside from that, there is no real contact with Michigan. Pharaon is a citizen of Saudi Arabia; First Arabian Corporation certainly has offices in Saudi Arabia; Luxembourg is closer to where Pharaon lives than the State of Michigan. The State of Michigan and the Federal Court sitting in Michigan just is really too far removed from where this matter really ought be be litigaged, especially when you get into the question of laws, which is necessarily going to have to come up if this matter is litigaged.

THE COURT: You may have to have some translators

(Tr-8)
here.

MR. MARLINGA: That is right. Why shouldn't we then, in the exercise of discretion, have it in a place where we don't need translators?

THE COURT: Before we go to the other two motions, let's here [sic] what Mr. Hoppe has to say on this. If I grant this one, I don't have to rule on the other two.

MR. HOPPE: Well, your Honor, I am surprised to hear Mr. Marlinga even suggest about foreign law, and I think we should be clear, both the Court and all the parties, on what we are talking about. We are talking about a purchase agreement of the controlling stock of the Bank of the Commonwealth. This is what we are talking about. Our client, Mr. Pharaon, sold Bank of the Commonwealth stock under a very simple agreement drafted in the United States, attached as Exhibit A to our motion for summary judgment, which is called stock purchase agreement. It says we hereby sell you the stock of the Bank of the Commonwealth in Detroit, Michigan, and you agree to pay. Everybody signed it, and then they paid 8 million some dollars in accordance with this purchase agreement, but refused to pay the last 750 slug. That's it.

THE COURT: You are suing for 750?
(Tr-9)

MR. HOPPE: Right.

Your Honor, I respectfully submit that what we are really talking about here, or at least we believe what we are talking about here, is that everyday that goes by, First Arabian is saving about 200 in the differential in the interest rate because we are only entitled to 12 per cent on the $750,000. There is no defense to this.

THE COURT: This case is kind of old too, isn't it?

MR. HOPPE: Yes, your Honor, and you know the prime rate is 18 or 20, and so that is a difference of 8 or 6 per cent per year on $750,000. The more delay can occur, the better off

First Arabian is. That is our perception of it.

THE COURT: Anything else?

MR. HOPPE: Well, your Honor, it seems to me it is perfectly clear that the Court has jurisdiction, and it would be an injustice —

THE COURT: (Interposing) He agrees I have jurisdiction. I think Moore quotes the state of the law.

MR. HOPPE: Yes, your Honor.

THE COURT: Do you have anything more?

(Tr-10)

MR. HOPPE: Not on the jurisdictional point.

THE COURT: Then I want to, if I deny this motion to dismiss for lack of jurisdiction, which I am going to do, then he has got another motion to amend, which I will hear, and then we will hear your summary judgment, but let me give just a very brief opinion.

I am going to deny the motion to dismiss because I do think as Moore points out, at the present posture, this is discretionary pendent jurisdiction, and the original case clearly was — there was jurisdiction in the United States District Court for the Eastern District of Michigan. The whole main case has been settled and what is left is this cross claim between the two parties here. I think there is no basis that I can think of to exercise my discretion to throw them out, throw the Plaintiffs out at this point.

Obviously, as pointed out by I think implicitly, if not explicitly in argument, if the Plaintiff started suit in any State Court in the United States of America, the Defendant would be moving to dismiss, and properly so, and the case would have to be litigated in the Courts of Saudi Arabia or maybe in Luxembourg, I am not sure, but anyway, we are here, it has

(Tr-11)

been here for four years, it is properly here, it is discretionary pendent jurisdiction, so it will remain. I will deny the motion to dismiss.

All right, Mr. Marlinga, you want to amend your Answer now that I kept the case here.

(Title of Court and Cause)

PARTIAL ORDER OF DISMISSAL

At a session of said Court, held in the Federal Building, in the City of Detroit, County of Wayne, State of Michigan this 9th day of July, 1981.

PRESENT: Honorable Horace W. Gilmore, District Judge.

Upon the consent of the parties, by their respective attorneys, and upon the records of this Court, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs' Complaint filed in this action, be and the same is, hereby dismissed with prejudice and without costs to any party; however, the cross-claims of Ghaith R. Pharaon against The First Arabian Corporation, S.A. are not hereby dismissed, and the Court shall retain jurisdiction of this case, which case shall remain on the Court's docket in order to adjudicate all claims or cross-claims.

HORACE W. GILMORE
District Judge

(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
By: /s/
Deputy Clerk

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and among the parties hereto, by their respective attorneys, that the above Order be entered.

Clark, Klein & Beaumont
By: /s/
1600 First Federal Building
Detroit, Michigan 48226
Attorneys for Plaintiffs
Dated:

Dykema, Gossett, Spencer, Goodnow & Trigg
By: /s/
400 Renaissance Center
Detroit, Michigan 48243
Attorneys for Defendants and Cross-Defendants
Estate of James T. Barnes, Sr. and James T. Barnes, Jr.
Dated:

Miller, Canfield, Paddock & Stone
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2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
Attorneys for Defendant and Cross-Plaintiff Ghaith R. Pharaon
Dated:

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Suite 1500
Southfield, Michigan 48075
Attorneys for Defendant and Cross-Defendant
The First Arabian Corporation, S.A.
Dated:

(Title of Court and Cause)

ORDER GRANTING DEFENDANT GHAITH R. PHARAON'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND AMENDED PLEADINGS

At a session of said Court, held in the Federal Building, Detroit, Michigan on March 18, 1980.

PRESENT: Honorable Horace W. Gilmore, District Judge.

Upon Motion of Defendant, Ghaith R. Pharaon, for Leave to File Supplemental and Amended Pleadings, and the Court being advised that there is no opposition to the Motion:

IT IS ORDERED, that Defendant Ghaith R. Pharaon's Motion for Leave to File Supplemental and Amended Pleadings be and the same hereby is granted.

HORACE W. GILMORE
District Judge

(A True Copy)
Clerk, U.S. District Court
Eastern District of Michigan
By: /s/ Anice Micallef
Deputy Clerk

No. 82-1209

UNITD STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELI BROAD and DONALD KAUFMAN,
Plaintiffs,

vs.

JAMES T. BARNES, SR., et al.,
Defendants,

GHAITH R. PHARAON,
Defendant,
Cross Plaintiff,
Appellee,

vs.

THE FIRST ARABIAN CORPORATION
Defendant,
Cross Defendant,
Appellant.

ORDER

(Filed June 3, 1983)

Before: MARTIN and CONTIE, Circuit Judges; and
PHILLIPS, Senior Circuit Judge.

Before the court is the appellant's motion for rehearing. Upon consideration, we find no cause for rehearing and the motion is hereby DENIED.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

John P. Hehman, Clerk

(Title of Court and Cause)

ORDER STAYING MANDATE
(Filed June 22, 1983)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is

hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELI BROAD and
DONALD KAUFMAN,

Plaintiffs,

v. No. 77-72757

JAMES T. BARNES, SR., JAMES T. BARNES, JR., GHAITH R. PHARAON, and THE FIRST ARABIAN CORPORATION, S.A., Jointly and Severally, Hon. Phillip Pratt

Defendants.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND AMENDED PLEADINGS

Defendant Ghaith R. Pharaon moves the Court for an order granting him leave to file a Supplemental and Amended Original Answer and Cross-Claim, pursuant to rules 13(g), 15(a) and 15(d) of the Federal Rules of Civil Procedure, on the

grounds that since plaintiff filed his Original Complaint new events have occurred that are material to this action, as is more fully shown in a copy of the proposed Supplemental First Amended Original Answer and Cross-Claim and defendant's memorandum in Support of its Motion for Leave to File Supplemental and Amended Pleadings, which are attached hereto.

On February 11, 1980, counsel for defendant Pharaon conferred with counsel for co-defendants First Arabian Corporation and James T. Barnes, Jr. and the estate of James T. Barnes, Sr. as well as counsel for the plaintiffs. Counsel for the plaintiffs do not oppose this Motion. Counsel for the Barnes do not oppose this Motion. Counsel for First Arabian Corporation opposes the Motion.

MILLER, CANFIELD, PADDOCK and STONE
By: /s/ RICHARD B. GUSHEE (P-14474)
And /s/ WOLFGANG HOPPE (P-15117)
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
Telephone: (313) 963-6420
Attorneys for Defendnat Ghaith R. Pharaon

Of Counsel:
Scott, Douglass & Keeton
2526 One Houston Center
Houston, Texas 77002
Dated: February 13, 1980

CROSS-CLAIMS

First Cross-Claim Against First Arabian

This is an action for breach of contract.

1. On November 12, 1976, Pharaon and defendant First Arabian Corporation executed a stock purchase agreement by which First Arabian bought all of Pharaon's interest in the Bank of Commonwealth. In connection with this purchase,

First Arabian agreed to "assume all obligations of Pharaon under the Barnes Stock Agreement and under any agreement relating to the Bank or ownership of the Subject Shares entered into by Pharaon prior to the date of purchase with the FDIC or any other state or federal regulatory authority." Further, First Arabian stated in this agreement, "[I]t is expressly agreed that . . . Pharaon is under no obligation to continue to perform the conditions of the Barnes Stock Agreement." A copy of the stock purchase agreement is attached hereto as Exhibit "A" and is incorporated herein for all purposes.

5. [sic] Pharaon has fully performed all his obligations pursuant to the stock purchase agreement with First Arabian. In fact, in an agreement subsequent to the November 12, 1976 agreement, First Arabian acknowledged Pharaon's full performance. In such agreement, First Arabian expressly stated, "Pharaon performed all his obligations pursuant to the Barnes Stock Agreement and received the Subject Shares free and clear of all liens and encumbrances." First Arabian further stated:

> First Arabian hereby assumes the remaining obligations of Pharaon under the Barnes Stock Agreement and under any agreement relating to the Bank or ownership of the Subject Shares entered in by Pharaon prior to the date of purchase with the FDIC or any other state or federal regulatory authority.

3. One of the obligations First Arabian agreed to assume from Pharaon was Pharaon's obligation, pursuant to his stock purchase agreement with the Barnes, to pay the Barnes $750,000 on February 1, 1980 as the final payment for the stock purchased by Pharaon from the Barnes and sold to First Arabian.

4. First Arabian has failed and refused to assume this obligation to pay the Barnes $750,000, and such refusal constitutes a breach of the stock purchase agreement between Pharaon and First Arabian.

5. As a result of First Arabian's breach of its agreement, Pharaon has become obligated to and has paid the Barnes $750,000 for which he has not been reimbursed by First Arabian.

Second Cross-Claim Against First Arabian

This is a claim for contractual indemnity and/or contribution.

6. Pharaon realleges and incorporates the allegations stated in paragraphs 1-5 above of his Cross-Claims.

7. Pursuant to the terms of its stock purchase agreement with Pharaon, First Arabian became obligated to assume all of Pharaon's obligations relating to the Bank of the Commonwealth stock, including the obligations plaintiffs alleged are owing to them. Accordingly, Pharaon is entitled to full indemnification or reimbursement from First Arabian for any amount Pharaon may be found to be owing to plaintiffs. Further, Pharaon is entitled to recover from First Arabian all its costs of suit, including reasonable attorneys' fees expended in defense of this suit.

8. Alternatively, if Pharaon should become liable to plaintiffs, and if he should have to pay any such amount to plaintiffs as the result of a judgment entered in this case or any settlement of such claims, he is entitled to contribution from First Arabian.

UNITES STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELI BROAD and DONALD KAUFMAN,
Plaintiffs,
vs.
JAMES T. BARNES, SR.,
JAMES T. BARNES, JR.,
GHAITH R. PHARAON, and THE FIRST
ARABIAN CORPORATION S.A.,
jointly and severally,
Defendants.

No. 77-2430-AAH

COMPLAINT FOR VIOLATION OF THE SECURITIES EXCHANGE ACT OF 1934; FOR VIOLATION OF THE CALIFORNIA CORPORATIONS CODE; FOR BREACH OF CONTRACT; FOR CONSPIRACY TO INDUCE BREACH OF CONTRACT; FOR CONVERSION; FOR MONEY HAD AND RECEIVED.

(Filed June 30, 1977)

Eli Broad ("Broad") and Donald Kaufman ("Kaufman") (hereinafter collectively referred to as "Plaintiffs") allege as follows:

PARTIES

1. Plaintiff Broad resides at 1 Oakmont Drive, Los Angeles, California 90046, and has been a citizen of the State of California continuously since 1964.

2. Plaintiff Kaufman resides at 3100 Mandeville Canyon Road, Los Angeles, California 90049, and has been a citizen of the State of California continuously since 1964.

3. Defendants James T. Barnes, Sr. ("Barnes, Sr.") and James T. Barnes, Jr. ("Barnes, Jr.") (hereinafter collectively referred to as the "Barnes") are citizens of the State of Michigan, and have their offices at 300 First National Building, Detroit, Michigan 48226.

4. Plaintiffs are informed and believe and thereupon allege that Defendant Ghaith R. Pharaon ("Pharaon") is a citizen and resident of Saudi Arabia.

5. Plaintiffs are informed and believe and thereupon allege that Defendant The First Arabian Corporation S.A. ("First Arabian") is a foreign corporation organized under the laws of Luxembourg.

JURISDICTION AND VENUE

6. This Court has jurisdiction of and over the subject matter of the First and Second Claims for Relief and of and over the person of each of the Defendants by reason of the provisions of Section 27 of the Securities Exchange Act of 1934 (the

"Exchange Act"), 15 U.S.C. §78aa, in that said claims are based upon and arise out of the conduct of Defendants in violation of Sections 10(b) and 14(a) of the Exchange Act, 15 U.S.C. §78j(b) and 78n(a) (hereinafter "Section 10(b)" and "Section 14(a)", respectively) and Rule 10b-5, 17 C.F.R.240.10b-5 (hereinafter "Rule 10b-5"), and Rule 14a-9, 17 C.F.R.240.14a-9 (hereinafter "Rule 14a-9"), promulgated thereunder. Such conduct was effected by Defendants using the means and instrumentalities of interstate transportation and commerce and of the mails.

7. This Court has pendent jurisdiction of the California State claims stated herein.

8. The jurisdiction of this Court of and over this action and of and over the person of each of the Defendants is also based upon diversity of citizenship. Plaintiffs are citizens of the State of California. The Barnes are citizens of the State of Michigan. Pharaon is a citizen of Saudi Arabia. First Arabian is a foreign corporation organized under the laws of Luxembourg. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars.

9. Many of the acts, practices, course of business and transactions described herein, constituting violations of Sections 10(b) and 14(a) of the Exchange Act and Rules 10b-5 and 14a-9 and of California State law, have occurred within the Central District of California.

COMMON ALLEGATIONS

10. Each of the Defendants is a controlling person of the other and a controlling person of the Bank of the Commonwealth, a Detroit, Michigan banking corporation (the "Bank") under Section 20 of the Exchange Act, 15 U.S.C. §78t.

11. In March 1972, Plaintiffs each owned 50,000 shares of $5.82 Cumulative Preferred Stock, par value $25 per share of the Bank (the "Preferred Stock"). Their combined holdings of 100,000 shares (the "Broad and Kaufman Preferred Stock") represented approximately 32% of the total of 304,465 shares of the Bank's outstanding Preferred Stock.

12. Holders of Preferred Stock were entitled to cumulative preferred dividends at the annual rate of $5.82 per share, payable quarterly on the first days of March, June, September and December of each year (hereinafter sometimes referred to as the "preferred dividend claim").

13. On or about February 1972, Barnes, Jr. initiated negotiations with Plaintiffs in Los Angeles County, California, to purchase the Broad and Kaufman Preferred Stock.

14. On or about March 14, 1972, at Los Angeles County, California, Broad entered into a written stock Purchase Agreement with Barnes, Jr. for the sale of his Preferred Stock to Barnes, Jr. on the terms and conditions therein set forth. A true and correct copy of the Stock Purchase Agreement is attached hereto as Exhibit A, and made a part hereof by reference as though fully set out at length herein.

15. On or about March 14, 1972, at Los Angeles County, California, Kaufman entered into a written Stock Purchase Agreement with Barnes, Jr. for the sale of his Preferred Stock to Barnes, Jr. on terms and conditions identical to those of Exhibit A hereto. (Broad's and Kaufman's Stock Purchase Agreements are hereinafter collectively referred to as the "Stock Purchase Agreements").

16. Pursuant to the terms of the Stock Purchase Agreements, Bares, Jr. agreed to pay to Broad and Kaufman each the principal amount of $2,825,000, plus:

> "3. (b) All cash dividends on the Preferred Stock which have not been paid prior to the date hereof and all future cash dividends payable with respect to the period from date hereof through June 30, 1973, plus
>
> (c) One-half (1/2) of all cash dividends payable with respect to the Preferred Stock by its existing terms for the period July 1, 1973 through January 31, 1977, except that Buyer's obligation to pay the purchase price, as herein defined, does not include an obligation to pay an amount measured by that portion of dividends

received by Buyer on Preferred Stock released to Buyer from Escrow, to the extent that such dividends are paid with respect to an accrual period subsequent to the date of such release."

17. In partial payment of the purchase price for the Broad and Kaufman Preferred Stock, Barnes, Jr. delivered a letter of credit to Broad and Kaufman each in the principal amount of $500,000. The balance of the purchase price was to be paid as follows:

(a) The joint and several promissory notes of the Barnes payable to Broad and Kaufman, respectively, in the principal amount of $2,325,000; and,

(b) All cash dividends payable pursuant to paragraphs 3(b) and 3(c) of the Stock Purchase Agreements immediately upon payment by the Bank.

18. Pursuant to these terms, the Barnes executed promissory notes dated June 30, 1973 payable to Broad and Kaufman, respectively, at Los Angeles, California, whereby the Barnes jointly and severally promised to pay to Broad and Kaufman each the principal amount of $2,325,000. A true and correct copy of the promissory note is attached hereto as part of Exhibit A (Exhibit 1 thereto), and made a part hereof by reference as though fully set forth at length herein.

19. Plaintiffs are informed and believe and thereupon allege that the Stock Purchase Agreements were assigned by Barnes, Jr. to Barnes, Sr. on or about September 1972, and then reassigned by Barnes, Sr. to an entity controlled by the Barnes.

20. Plaintiffs are informed and believe and thereupon allege that on or about February 3, 1975, the Barnes and/or an entity controlled by them entered into an agreement (the "Agreement") with Pharaon wherein they agreed to sell to Pharaon and Pharaon agreed to purchase the Barnes' stock interest in the Bank, including the Barnes' interest in the Stock Purchase Agreements and the Broad and Kaufman Preferred Stock. Pursuant to said Agreement, Pharaon assumed the

obligations owing to Broad and Kaufman under the Stock Purchase Agreements.

21. By a letter dated April 19, 1976, Plaintiffs gave formal notice to Pharaon of their continuing rights under the Stock Purchase Agreements. A true and correct copy of said letter is attached hereto as Exhibit B, and made a part hereof by reference as though fully set forth at length herein.

22. Pursuant to the Stock Purchase Agreements and the promissory notes, the Broad and Kaufman Preferred Stock was deposited with an escrow agent in accordance with the terms and conditions of written escrow agreements entered into by and between Barnes, Jr. with Broad and Kaufman, respectively, concurrently with the execution of the Stock Purchase Agreements (the "Escrow Agreements"). A true and correct copy of the Escrow Agreement is attached hereto as part of Exhibit A (Exhibit 2 thereto), and made a part hereof by reference as though fully set forth at length herein.

23. Pursuant to the terms of the Stock Purchase Agreements, the Escrow Agreements and the promissory notes, Defendants made the following payments on the promissory notes and the following number of shares of Broad and Kaufman Preferred Stock were released from escrow and assigned and delivered to Defendants on the following dates:

Date	*Principal Amount Paid*	*Shares Conveyed*
December 31, 1975	First Installment Payment $775,000	45,000
January 31, 1976	Second Installment Payment $775,000	27,500
January 31, 1977	Third Installment Payment $775,000	27,500

24. Beginning in 1972, dividends on the Preferred Stock were in arrears, and as of on or about June 30, 1976, arrearages aggregated $9,745,924 ($32.01 per share). As a result of such dividend arrearages, since 1972 the shareholders of the Pre-

ferred Stock were entitled under the Bank's Articles of Incorporation to elect a majority of the Board of Directors of the Bank and the holders of the Common Stock of the Bank were entitled to elect the remaining members of the Board of Directors.

25. The Barnes' acquisition of the Broad and Kaufman Preferred Stock and their contemporaneous acquisition of 1,780,435 shares of Common Stock representing 39% of the Bank's outstanding Common Stock and 65,000 shares of Preferred Stock representing 21% of the Bank's outstanding Preferred Stock gave the Barnes possession, directly and/or indirectly, of the power to direct or cause the direction of the management and policies of the Bank from at or about March 1972.

26. From at or about March 1972 through 1976, the Barnes were members of the Board of Directors of the Bank. Barnes, Sr. was a member of the Executive Committee of the Board of Directors. By virtue of their positions and their stock holdings, the Barnes exercised the power to direct the Bank's operations and affairs.

27. As a result of the Agreement by and between the Barnes and Pharaon, from at or about February 1975, Pharaon was the beneficial owner of and had the right to vote 1,424,348 shares (31%) of the Common Stock of the Bank and 165,000 shares (54%) of the Preferred Stock of the Bank. By virtue of such stock holdings, Pharaon possessed, directly and/or indirectly, the power to direct or cause the direction of the management and policies of the Bank, and through his nominees on the Board of Directors of the Bank and as a controlling shareholder in the Bank, Pharaon exercized [sic] the power to direct the Bank's operations and affairs.

FIRST CLAIM FOR RELIEF

(Violation By Defendants of Section 10(b) of the Exchange Act and Rule 10b-5)

28. Plaintiffs reallege and incorporate herein by reference as

though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint.

29. At all times complained of herein, Defendants possessed, directly and/or indirectly, the power to direct or cause the direction of the management and policies of the Bank and exercised this power to completely direct the Bank's operations and affairs.

30. In effecting the unlawful conduct complained of hereinafter, Defendants acted knowingly, intentionally, purposefully or willfully and did so act in concert and in conspiracy with each other.

31. The Barnes induced Plaintiffs to enter into the Stock Purchase Agreements by offering and agreeing to pay as part of the purchase price for the Broad and Kaufman Preferred Stock the amounts set forth in paragraphs 3(b) and (c) of the Stock Purchase Agreements in consideration of the preferred dividend claim of the Broad and Kaufman Preferred Stock.

32. Plaintiffs agreed to sell the Broad and Kaufman Preferred Stock to the Barnes in reliance upon the Barnes' representation and covenant that, inter alia:

> (a) "8. (c) Neither Buyer [Barnes, Jr., and his successors or assigns, Barnes, Sr. and Pharaon]* nor any person or entity controlled by Buyer will cause or permit any adverse change in existing dividend rights of the Preferred Stock without Seller's [Broad or Kaufman, respectively]* written consent."
>
> *Brackets added.
>
> (b) "10. *Assignment; succession.* The rights and obligations of Seller hereunder shall inure to and oblige Seller, his successors and assigns. The rights and obligations of Buyer hereunder shall inure to and oblige Buyer, his successors and assigns, except that no assignment of Buyer's obligation shall be made by Buyer without the prior written consent of Seller, which shall not be unreasonably refused."

33. By virtue of the Agreement between the Barnes and Pharaon, the obligations owing to Broad and Kaufman under the Stock Purchase Agreement were assumed by Pharaon as successor and/or assignee thereto.

34. At all times complained of herein, the Stock Purchase Agreements were executory contracts for the sale or exchange of securities, in that Defendants' covenant not to cause or permit any adverse change in the existing dividend rights of the Preferred Stock set forth at paragraphs 8(c) and 10 of the Stock Purchase Agreements was a continuing covenant and representation of the Defendants.

35. The staggered release from escrow and the assignment and delivery to Defendants of the Broad and Kaufman Preferred Stock upon payment of each principal installment on the promissory notes, constituted a continuing sale or exchange of the Broad and Kaufman Preferred Stock.

36. On or about June 30, 1976, the preferred dividend claim of the Broad and Kaufman Preferred Stock amounted to approximately $3,201,000 and the liquidation preference right of the Broad and Kaufman Preferred Stock amounted to approximately $10,000,000. Pursuant to paragraphs 3(b) and (c) of the Stock Purchase Agreements, Defendants had agreed to pay and/or cause to be paid by the Bank to Broad and Kaufman approximately 71% of the preferred dividend claim of the Broad and Kaufman Preferred Stock. On or about June 30, 1975, such obligation amounted to approximately $2,262,500.

37. Plaintiffs are informed and believe and thereupon allege that during 1976 Defendants devised and carried out a plan, scheme, practice and course of business which operated as a fraud and deceit upon the Plaintiffs as follows:

> (a) Defendants entered into an agreement with the Federal Deposit Insurance Corporation (the "FDIC") and caused the Bank to enter into this agreement with the FDIC, whereby the entire capitalization of the Bank would be restructured (the "recapitalization plan").

(b) Defendants caused the recapitalization plan to be recommended and proposed to the FDIC, the Board of Directors of the Bank and the shareholders of the Bank, and secured the adoption of the recapitalization plan under the pretext that the recapitalization plan presented the sole alternative available to the Bank for repayment of certain notes to the FDIC (the "FDIC Notes") and for the infusion of additional equity capital to the Bank.

(c) The effect of the recapitalization plan and the primary objective of Defendants' scheme to recapitalize the Bank was to increase Pharaon's controlling interest and equity position in the Bank and increase the revenues and security available to the Barnes.

(d) In order to accomplish these objectives, the recapitalization plan:

(i) extinguished the preferred dividend claim of the Preferred Stock;

(ii) converted the existing two classes of capital stock of the Bank into a single class of New Common Stock on the basis of five shares of New Common Stock for each then outstanding share of Preferred Stock and one share of New Common Stock for each ten then outstanding shares of Common Stock; and,

(iii) provided for the sale of 2,500,000 additional shares of New Common Stock at a price of $4.00 per share to First Arabian.

(e) By virtue of the adoption of the recapitalization plan, Pharaon through his affiliated entity First Arabian was able to acquire 77.4% of the shares of New Common Stock outstanding of the Bank and the Barnes received payment in respect of their Agreement with Pharaon.

38. Plaintiffs had sold their Broad and Kaufman Preferred Stock to Defendants in reliance upon Defendants' continuing

representations and covenant that they would not cause or permit nor cause or permit any entity or person controlled by them to cause or permit any adverse change in the existing dividend rights of the Preferred Stock. Defendants knew that said representations were false and intended that the aforesaid unlawful acts would extinguish the rights of these Plaintiffs to receive payment in respect of the preferred dividend claim on the Broad and Kaufman Preferred Stock without any compensation therefor being paid to these Plaintiffs.

39. By engaging in the aforesaid transactions and activities, Defendants have each individually and in knowing concert and conspiracy violated, or knowingly and materially aided the violation of Section 10(b) of the Exchange Act and Rule 10b-5 as follows:

(a) By intentionally or knowingly employing schemes, devices, and artifices to defraud Plaintiffs;

(b) By intentionally or knowingly making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(c) By intentionally or knowingly engaging in acts, practices, and courses of business which have operated as a fraud and deceit upon Plaintiffs.

40. In effecting the aforesaid unlawful acts, Defendants employed the United States mail to and from the State of California and caused letters and proxy materials to be sent through the mails to the Central District of California, and made interstate telephone calls to the Central District of California.

41. As a result of the aforesaid unlawful acts of Defendants in violation of Section 10(b) of the Exchange Act and Rule 10b-5, the preferred dividend claim of the Broad and Kaufman Preferred Stock was extinguished and Plaintiffs' rights to such preferred dividend claim became and are now wholly

without value and are utterly worthless and Plaintiffs have been damaged in an amount in excess of $2,262,500.

SECOND CLAIM FOR RELIEF

(Violation By Defendants of Section 14(a) of the Exchange Act and Rule 14a-9)

42. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint and Paragraphs 29 through 40 of the First Claim for Relief to this Complaint.

43. The adoption of the recapitalization plan required the affirmative vote of the shareholders of two-thirds of the outstanding shares of Preferred Stock, voting as a separate class, and the shareholders of two-thirds of the outstanding shares of Common Stock, voting as a separate class.

44. As part of Defendants' scheme to defraud and deceive Plaintiffs and in order to secure the requisite affirmative vote of the shareholders of the Bank, on or about November 12, 1976, Defendants caused the Bank to mail a proxy solicitation to its shareholders.

45. At the time the proxy solicitation was made, Plaintiffs owned of record 27,500 shares of Preferred Stock of the Bank.

46. Said proxy solicitation gave less than a full and fair disclosure and was false or misleading in that it contained material misrepresentations and omitted material facts in that:

(a) The proxy statement failed to disclose that the purpose and effect of the adoption of the recapitalization plan was to increase Pharaon's controlling interest and equity position in the Bank, and increase the revenue and security of the Barnes.

(b) The proxy statement failed to disclose that Pharaon had caused First Arabian to expressly condition its willingness to provide equity capital to the Bank upon the approval of the recapitalization plan in order to coerce the Bank and its shareholders into approving the recapitalization plan.

(c) The proxy statement failed to disclose that Pharaon had conditioned his obligation to complete the Agreement between the Barnes and Pharaon, including Pharaon's obligation to pay Barnes, upon the approval of the recapitalization plan and that said condition influenced or may have influenced management opinions issued in connection with the recapitalization plan.

(d) The notice of meeting urged the shareholders to adopt the recapitalization plan on the basis that disapproval of the recapitalization plan would block the FDIC's assistance and jeopardize the Bank's future by virtue of the purported fact that the Bank would have been unable to repay the FDIC Notes on their maturity date without terminating operations and liquidating the assets of the Bank, but failed to disclose that the FDIC had not advised the Bank that the FDIC would demand payment or take any other action.

(e) The proxy statement failed to disclose that the FDIC would have supported other reorganization alternatives other than the recapitalization plan.

(f) The proxy statement failed to disclose that Defendants' actions were a breach of their Stock Purchase Agreements with Plaintiffs.

47. As part of the scheme to defraud and deceive Plaintiffs, Defendants have each individually and in knowing concert and conspiracy violated, or knowingly and materially aided the violation of Section 14(a) of the Exchange Act and Rule 14a-9 by causing the aforesaid proxy statement and notice of meeting to contain statements which, at the time and in the light of the circumstances under which they were made, were false and misleading with respect to material facts, or which omitted to state material facts necessary in order to make the statements therein not false or misleading.

48. As a proximate result of the aforesaid unlawful acts of Defendants, the preferred dividend claim of the Broad and

Kaufman Stock was extinguished and Plaintiffs' rights to such preferred dividend claim became and are now wholly without value and are utterly worthless and Plaintiffs have been damaged in an amount in excess of $2,262,500.

THIRD CLAIM FOR RELIEF

(Violation By Defendants of California Corporations Code Section 25401)

49. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint and Paragraphs 29 through 40 of the First Claim for Relief to this Complaint and Paragraphs 43 through 47 of the Second Claim for Relief to this Complaint.

50. By engaging in the aforesaid transaction and activities described in the First and Second Claims for Relief, the Defendants, each individually and in knowing concert and conspiracy, have violated Section 25401 of the California Corporations Code by offering to buy, or by buying, in this State securities by means of written and oral communications which included untrue statements of material facts and which omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

51. As a result of the aforesaid unlawful acts of Defendants, the preferred dividend claim of the Broad and Kaufman Preferred Stock was extinguished and Plaintiffs' rights to such preferred dividend claim became and are now wholly without value and are utterly worthless and Plaintiffs have been damaged in an amount in excess of $2,262,500.

FOURTH CLAIM FOR RELIEF

(Against Defendants For Breach of Contract)

52. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint.

53. Pursuant to the Stock Purchase Agreement, Barnes, Jr. agreed to pay as part of the purchase price for the Broad and Kaufman Preferred Stock the following amounts in consideration of the preferred dividend claim of the Broad and Kaufman Preferred Stock:

> "3. (b) All cash dividends on the Preferred Stock which have not been paid prior to the date hereof and all further cash dividends payable with respect to the period from date hereof through June 30, 1973, plus
>
> (c) One-half (1/2) of all cash dividends payable with respect to the Preferred Stock by its existing terms for the period July 1, 1973 through January 31, 1977, except that Buyer's obligation to pay the purchase price, as herein defined, does not include an obligation to pay an amount measured by that portion of dividends received by Buyer on Preferred Stock released to Buyer from Escrow, to the extent that such dividends are paid with respect to an accrual period subsequent to the date of such release.

54. To protect Broad's and Kaufman's preferred dividend claim, Barnes, Jr. agreed as follows:

> "8. (c) Neither Buyer nor any person or entity controlled by Buyer will cause or permit any adverse change in existing dividend rights of the Preferred Stock without Seller's written consent."

It was further agreed that:

> "10. *Assignment; Succession.* The rights and obligations of Seller hereunder shall inure to and oblige Seller, his successors and assigns. The rights and obligations of Buyer hereunder shall inure to and oblige Buyer, his successors and assigns, except that no assignment of Buyer's obligation shall be made by Buyer without the prior written consent of Seller, which shall not be unreasonably refused."

55. On or about June 30, 1976, the preferred dividend claim

of the Broad and Kaufman Preferred Stock amounted to approximately $3,201,000 and the liquidation preference right of the Broad and Kaufman Preferred Stock amounted to approximately $10,000,000. Pursuant to paragraphs 3(b) and (c) of the Stock Purchase Agreement, Defendants had agreed to pay and/or cause to be paid by the Bank to Broad and Kaufman approximately 71% of the preferred dividend claim of the Broad and Kaufman Preferred Stock. On or about June 30, 1976, such obligation amounted to approximately $2,262,500.

56. Defendants initiated and/or developed and/or implemented a recapitalization plan for the Bank which became effective on or about December 20, 1976, and which plan extinguished all dividend rights of the Preferred Stock without Plaintiffs' written consent.

57. Defendants by their acts thus caused and/or permitted an adverse change in the existing dividend rights of the Preferred Stock in contravention of the specific prohibition of Paragraphs 8(c) and 10 of the Stock Purchase Agreements.

58. As a result of said actions on the part of Defendants, the rights of these Plaintiffs to receive payment in respect of the preferred dividend claim on the Broad and Kaufman Preferred Stock were extinguished without any compensation therefor being paid to these Plaintiffs and Plaintiffs have been damaged in an amount in excess of $2,262,500.

FIFTH CLAIM FOR RELIEF

(Against Defendants For Breach of Contract)

59. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint and Paragraphs 53 through 57 of the Fourth Claim for Relief to this Complaint.

60. Plaintiffs are informed and believe and thereupon allege that the Agreement between the Barnes and Pharaon purported to sell to Pharaon all of the preferred dividend claim which had accrued upon the Broad and Kaufman Preferred

Stock and contained no limitations restricting any efforts or plans by Pharaon to alter or abrogate or extinguish Plaintiffs' dividend rights relative to the Preferred Stock.

61. The conduct of the Barnes constitutes a breach of paragraph 8(c) of the Stock Purchase Agreements and, similarly the conduct of Pharaon, as successor and/or assignee of the Barnes pursuant to paragraph 10 thereof, also constitutes a breach of the Stock Purchase Agreements.

62. As a result of said actions on the part of Defendants, the rights of these Plaintiffs to receive payment in respect of the preferred dividend claim on the Broad and Kaufman Preferred Stock were extinguished without any compensation therefor being paid to these Plaintiffs and Plaintiffs have been damaged in an amount in excess of $2,262,500.

SIXTH CLAIM FOR RELIEF

(Against Defendants For Damages for Conspiracy to Induce a Breach of Contract)

63. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint.

64. Pharaon at all times herein complained of, had notice and knowledge of the Stock Purchase Agreements.

65. Plaintiffs are informed and believe and thereupon allege that Pharaon willfully and maliciously conspired to deprive Plaintiffs of the benefits of their Stock Purchase Agreements by inducing the Barnes to breach said contracts.

66. Plaintiffs are informed and believe and thereupon allege that during 1976, the Defendants had various conferences in which they conspired and laid plans to wrongfully breach the Stock Purchase Agreements and in furtherance of their conspiracy the Barnes acted by virtue of their position with the Bank to secure the adoption and implementation of a recapitalization plan which extinguished all dividend rights assured the Plaintiffs by the Stock Purchase Agreements, and that

Defendants, through their nominees on the Board of Directors of the Bank and as controlling shareholders in the Bank voted to approve said plan.

67. As a direct and proximate result of the conspiracy between Defendants herein alleged, Defendants violated, repudiated and breached the Stock Purchase Agreements and Plaintiffs have thereby suffered damage in excess of $2,262,500.

68. In committing the acts herein alleged, Defendants, and each of them, acted with malice toward Plaintiffs, and Plaintiffs are therefore entitled to recover exemplary damages from them, and each of them, in the sum of $3,000.00.

SEVENTH CLAIM FOR RELIEF

(Against Defendants for Conversion)

69. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint and Paragraphs 53 through 57 of the Fourth Claim for Relief to this Complaint and Paragraphs 60 and 61 of the Fifth Claim for Relief to this Complaint.

70. On or about December 20, 1976, the Bank adopted a recapitalization plan under the direction of the Barnes and Pharaon which, among other things, (i) extinguished the Preferred Stock and the preferred dividend claims thereon, and (ii) provided for the issuance of 5 shares of a new common stock of the Bank for each share of Preferred Stock outstanding. This new common stock was valued at approximately $4.00 per share.

71. Pursuant to this recapitalization plan, the Broad and Kaufman Preferred Stock then held by Pharaon became transformed by said plan into 500,000 shares of the new common stock of the Bank.

72. Plaintiffs are informed and believe and thereupon allege that approximately 24% of the 500,000 new common shares exchanged for the Broad and Kaufman Preferred Stock were

attributable to the preferred dividend claim thereon.

73. Pursuant to the Stock Purchase Agreements, Plaintiffs were entitled to payment from Pharaon and/or the Barnes with respect to the preferred dividend thereon and, accordingly, Plaintiffs have a property interest in said 500,000 shares of new common stock in an amount subject to proof.

74. Plaintiffs have not consented to said exchange and Pharaon has unlawfully withheld said new common shares and converted the full value thereof to his own use.

EIGHTH CLAIM FOR RELIEF

(Against the Barnes for Money Had and Received)

75. Plaintiffs reallege and incorporate herein by reference as though fully set forth each and every allegation of Paragraphs 1 through 27 of this Complaint.

76. Pursuant to the Agreement between the Barnes and Pharaon, the Barnes sold to Pharaon 1,424,348 shares of the common stock of the Bank and 165,000 shares of the Bank's Preferred Stock, including the Broad and Kaufman Preferred Stock.

77. Plaintiffs are informed and believe that pursuant to said Agreement, Plaintiffs' rights to the accrued and unpaid dividends on the Broad and Kaufman Preferred Stock were purchased by Pharaon and the Barnes accordingly have received payment in consideration for Plaintiffs' preferred dividend claim.

78. Within the last four years, the Barnes thus became indebted to Plaintiffs in an amount subject to proof for money had and received by the Barnes for the use and benefit of Plaintiffs.

79. Neither the whole nor part of said sum has been paid, although demand therefor has been made, and there is now due, owing and unpaid that portion of the consideration fairly attributable to Broad's and Kaufman's preferred dividend claim paid to the Barnes by Pharaon.

WHEREFORE, Plaintiffs Eli Broad and Donald Kaufman pray for judgment against Defendants James T. Barnes, Sr., James T. Barnes, Jr., Ghaith R. Pharaon, and The First Arabian Corporation S.A., and each of them, jointly and severally, as follows:

1. As to the First, Second, Third, Fourth and Fifth Claims for Relief, the sum of $2,262,500, plus a further sum in an amount subject to proof, plus interest thereon.

2. As to the Sixth Claim for Relief, the sum of $2,262,500, plus a further sum in an amount subject to proof, plus interest thereon, and exemplary damages in the sum of $3,000,000.

3. As to the Seventh Claim for Relief, the sum of $480,000, plus a further sum in an amount subject to proof, plus interest thereon.

4. As to the Eighth Claim, for damages in an amount not presently known.

5. For the cost of suit herein; and

6. For such other and further relief as may be just and equitable under the circumstances.

DATED: June 30, 1977.

MUNGER, TOLLES & RICKERSHAUSER
RONALD L. OLSON, ESQ.
SIMON M. LORNE, ESQ.
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By: /s/ MICHAEL D. MILLER
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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution Art. III, §2, cl.1

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; — between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 USC Rule 13(g)

> Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 83-109

THE FIRST ARABIAN CORPORATION, S.A.,
Petitioner,

v.

GHAITH R. PHARAON,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PANDICK PRESS HOUSTON, INC. [illegible] SOUTH SHEPHERD (713) [illegible]

QUESTIONS PRESENTED

1. Whether respondent's cross-claim against petitioner bore a logical relationship to plaintiffs' federal claims such that the cross-claim was within the ancillary jurisdiction of the District Court.

2. Whether the District Court abused its discretion in granting summary judgment on respondent's cross-claim after plaintiffs' federal claims had been settled.

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1. Whether respondent's cross-claim against petitioner bore a logical relationship to plaintiffs' federal claims such that the cross-claim was within the ancillary jurisdiction of the District Court.

2. Whether the District Court abused its discretion in granting summary judgment on respondent's cross-claim after plaintiffs' federal claims had been settled.

STATEMENT OF THE CASE

Petitioner's statement of the case omits key points relating to this petition, particularly in its characterization of the original claim asserted by the plaintiffs in this action. The original plaintiffs, Eli Broad and Donald Kaufman, are former preferred stockholders in the Bank of the Commonwealth in Detroit ("BOC"). They sold their BOC preferred stock to defendants James T. Barnes, Sr. and James T. Barnes, Jr. (collectively, the "Barnes"), but retained certain accrued dividend claims. The Barnes later sold all their interest in BOC, including the preferred stock, to defendant Dr. Ghaith R. Pharaon, who in turn sold all his interest to defendant First Arabian Corporation, S.A. as part of a recapitalization plan in which old preferred stock (and associated dividend claims) was converted to a new class of common stock and additional new common stock was issued and sold to First Arabian. This recapitalization resulted in the extinguishment of plaintiffs' preferred dividend claims. Plaintiffs' original Complaint asserted that this series of events and transactions, culminating in the recapitalization, was part of an unlawful scheme among defendants to extinguish plaintiffs' dividend claims. Plaintiffs sought damages from the Barnes, Dr. Pharaon and First Arabian for the value of the extinguished claims. Appendix to Petition for Certiorari ("Appendix"), at 24a-43a.

The agreement that formed the basis for respondent Pharaon's cross claim is the stock purchase agreement between Pharaon and First Arabian (the "Pharaon/First Arabian Stock Agreement") that was an integral part of the series of transactions attacked by plaintiffs Broad and Kaufman. In that agreement, which was executed on November 12, 1976, First Arabian agreed to buy Pharaon's BOC stock on the same terms that Pharaon had bought it from the Barnes. Thus, First Arabian agreed to pay Pharaon the amounts he had previously paid the Barnes and to assume Pharaon's obligation to make

additional payments to the Barnes due February 1, 1977, February 1, 1978, February 1, 1979, and February 1, 1980.[1]

The recapitalization was approved by BOC shareholders on December 21, 1976. On January 25, 1977, both Pharaon's sale to First Arabian and the issuance of new common by BOC to First Arabian were completed. A follow-up agreement between Pharaon and First Arabian, executed as of the January 25 closing, recited the occurrence of each of the events to which the Pharaon/First Arabian Stock Agreement was subject and provided that First Arabian "hereby assumes the remaining obligations of Pharaon" to the Barnes.

The stock sale completed, First Arabian assumed control of BOC in early 1977. In 1977, 1978 and 1979, First Arabian paid to the Barnes the payments due them under the Barnes/Pharaon Stock Agreement. In the meantime, on June 30, 1977, only six months after consummation of the Pharaon/First Arabian Stock Agreement and the recapitalization, Broad and Kaufman filed their original complaint. Thus, First Arabian made two payments after Broad and Kaufman filed their lawsuit. When the final February 1, 1980 payment of $750,000 became due, however, First Arabian refused to pay it. Pharaon then paid the $750,000 owing to the Barnes and sought reimbursement from First Arabian. First Arabian refused to reimburse Pharaon.

Pharaon promptly filed a cross-claim in the Broad and Kaufman principal action and sought damages for First Arabian's breach of the Pharaon/First Arabian stock agreement. Pharaon predicated jurisdiction of his cross-claim on the doctrine of ancillary jurisdiction, stating that the cross-claim "arise[s] from the transaction or occurrence of the original action or relates to property that is the subject matter of the original action" (Pharaon's Motion for Leave to File

[1] Respondent's Statement of the Case is based upon the voluminous summary judgment record in the District Court. Unless otherwise indicated, the facts as set forth herein are uncontroverted. Should the Court grant the writ of certiorari, respondent will supplement the Appendix with the relevant pleadings.

Supplemental and Amended Pleading, Appendix, at 21a-24a). On March 18, 1980, the court granted Pharaon's motion for leave to file (Appendix, at 19a). Thereafter, on April 29, 1980, First Arabian filed its answer to Pharaon's cross-claim; it did not at that time object to jurisdiction, nor did it suggest that the cross-claim was not otherwise properly before the court. Indeed, the only excuse First Arabian advanced for its failure to make the last payment was a broad assertion that the Broad and Kaufman complaint brought into question its obligation.

By motion dated November 13, 1980, before the dismissal of the plaintiffs' claims, Pharaon moved for summary judgment on his cross-claim against First Arabian. On January 5, 1981, nearly a week after responses to that motion were due, and less than two weeks before the hearing date, First Arabian filed its motion to dismiss for lack of jurisdiction, asserting for the first time that Pharaon's cross-claim did not "arise out of the same transaction or occurrence" as plaintiffs' original claim.[2] The District Court denied First Arabian's jurisdictional motion (Appendix, at 7a, 9a), and the Sixth Circuit affirmed (Appendix, at 1a-4a).

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[2] Because First Arabian's motion questioned the court's subject-matter jurisdiction, the District Court was obliged to consider it despite its having been filed at the last minute. The timing of the motion is relevant, however, as it indicates that the motion (like petitioner's opposition to respondent's motion for summary judgment and petitioner's motion for leave to file an amended answer filed a day later) constituted a last-ditch, frantic effort to stave off Pharaon's collection of a debt on which First Arabian reneged over three and one-half years ago.

ARGUMENT

I.

RESPONDENT'S CROSS-CLAIM AGAINST PETITIONER BORE A LOGICAL RELATIONSHIP TO PLAINTIFFS' FEDERAL CLAIMS AND WAS WITHIN THE DISTRICT COURT'S ANCILLARY JURISDICTION.

Despite petitioner First Arabian's protestations to the contrary, there is very little disagreement about the controlling legal standards for judging the jurisdictional issue in this case. It is well-established that cross-claims under Rule 13(g), Federal Rules of Civil Procedure, fall within the ancillary jurisdiction of the federal courts and need not present independent grounds for federal jurisdiction. *See* 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §1433, at 177-180 (1975). Further, it is universally agreed that to sustain jurisdiction, respondent Pharaon need only demonstrate that his cross-claim was proper under Rule 13(g); that is, that it was a claim "arising out of the transaction or occurrence that is the subject matter of either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." This rule has been construed liberally "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court . . . and in order to settle as many related claims as possible in a single action." *Id.* §1431, at 161.

Because the Rule 13(g) standard—"arising out of the transaction or occurrence that is the subject matter . . . of the original action"—is virtually identical in language to that in Rule 13(a) governing compulsory counterclaims, many courts look to cases construing Rule 13(a) in deciding whether a cross-claim falls within Rule 13(g). The leading case regarding the "same transaction or occurrence" standard is *Moore v. New*

York Cotton Exchange, 270 U.S. 593, 610 (1926). In that case, the Court adopted a liberal, flexible definition of the "same transaction or occurrence" standard:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. [Citations omitted.]

The Sixth Circuit adopted the *Moore* "logical relationship" standard for determining whether a cross-claim is within the ancillary jurisdiction in *Lasa Per L'Industria Del Marmo Societe Per Azioni v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969). *See also City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978) (*Moore* "logical relationship" test is appropriate standard for determination of whether counterclaim is compulsory).

The Sixth Circuit's decision in this case is but a straightforward application of these settled principles. The Pharaon/First Arabian Stock Agreement clearly "is one of the links in the chain which constitutes the transaction upon which" plaintiffs Broad and Kaufman predicated their causes of action.[3] *Moore, supra*, 270 U.S. at 610. As explained above, the Broad and Kaufman complaint challenged the extinguishment of certain preferred dividend rights. The BOC recapitalization which actually extinguished those rights was approved by the shareholders on December 21, 1976, just over a month after Pharaon and First Arabian had executed the agreement sued upon here. The Pharaon/First Arabian Stock Agreement was contingent on stockholder approval of both the conversion of preferred into new common stock and the issuance of new common to First Arabian. The issuance of new common stock to First Arabian and the conversion plan were presented as a

[3] Respondent has devoted little attention to the "same property" test in Rule 13(g) because the "transaction or occurrence" test so clearly encompasses Pharaon's cross-claim. Pharaon's cross-claim satisfies the former test as well because the property involved in the original lawsuit and the cross-claim is the BOC preferred stock and related dividend claim.

"single proposal" to the shareholders, and the resolution submitted to and approved by the shareholders encompassed both the conversion and the issuance of new common to First Arabian. Properly viewed, the Pharaon/First Arabian Stock Agreement, the conversion of old preferred into new common, and the issuance of additional new common to First Arabian were in fact one transaction: all were contingent on the others, and all were negotiated, approved and consummated at approximately the same time, with the same ultimate purpose—the recapitalization of the Bank under First Arabian's control and direction.

Contrary to assertions made by petitioner, Broad and Kaufman's proof of liability against First Arabian necessarily involved proof of the Pharaon/First Arabian Stock Purchase Agreement. Without such proof, plaintiffs had no case against any defendant and certainly not against First Arabian. Indeed, the only element of Pharaon's cross-claim not raised by Broad and Kaufman's complaint against Pharaon and First Arabian was First Arabian's non-payment of the last installment, a fact it readily admitted. The essential element of the Pharaon cross-claim—the agreement itself—was an integral, essential element of the Broad and Kaufman claim. Pharaon's claim (breach of his agreement with First Arabian) thus arose out of the same transaction or occurrence that was the subject matter of plaintiffs Broad and Kaufman's suit (the allegedly conspiratorial recapitalization and related transactions).

If further evidence of the relatedness of Pharaon's cross-claim to plaintiffs' original claim were needed, First Arabian itself provided it. To acquire the BOC stock and to become a bank holding company, First Arabian was required to file an application with the Board of Governors of the Federal Reserve System. In its 1976 application, First Arabian stated: "The purchase of the bank stock by the applicant is an integral part of the proposed recapitalization plan for the bank." Also, in its Original Answer to Pharaon's Cross-claim, First Arabian stated, in paragraph 2, "that the Complaint in the instant action

questions whether Pharaon has fully performed all his obligations pursuant to the [Pharaon/First Arabian] stock agreement"; and, in paragraph 3, that "Plaintiff's Complaint questions whether Pharaon has breached the stock purchase agreement by not providing adequate consideration to this Defendant, by not fulfilling the representations and warranty quoted in paragraph 2 above, and by not fairly dealing with Defendant in that, on information and belief, Pharaon knew at the time of the [Pharaon/First Arabian Stock Agreement] that Plaintiffs might assert the claims set forth in the instant action but did not disclose the same to this Defendant." These allegations were also contained in First Arabian's proposed First Amended Answer (filed at the same time as its jurisdictional motion) and were apparently seen by First Arabian as sufficient to raise a defense to Pharaon's claim.

It is inconsistent for First Arabian to assert that Broad and Kaufman's original claim and Pharaon's cross-claim are not logically related, while at the same time raising Broad and Kaufman's allegations in defense to the cross-claim. Several courts have looked to the defenses asserted in determining the "logical relationship" between claims. *See, e.g., E. J. Korvette Co. v. Parker Pen Co.,* 17 F.R.D. 267 (S.D.N.Y. 1955) (defense "best demonstrated" logical relationship). In this case, had the plaintiffs' claims not been settled, acceptance of First Arabian's position would have rendered two trials of the same issues a virtual certainty and created the possibility of inconsistent results, in that Pharaon would have been required to file an entirely separate action against which First Arabian would have defended based on the allegations contained in Broad and Kaufman's suit. The eventual settlement of Broad and Kaufman's claim did not destroy the interrelationship of the cross-claim and the original suit; rather, the settlement destroyed the only defense to Pharaon's claim that First Arabian could conceive.

II.

THE STANDARDS GOVERNING THE EXERCISE OF ANCILLARY JURISDICTION DO NOT REQUIRE SUPPLEMENTATION OR EXPLICATION BY THIS COURT.

In an attempt to create an issue where none exists, First Arabian seizes upon some differences in the language used by the various circuits and argues that those circuits have "split" on the question of the standard governing the exercise of ancillary jurisdiction. In particular, First Arabian appears to argue that the standard is not that set forth in *Moore*—"logical relationship"—but some other, allegedly more exacting standard. Although it never actually commits itself to what that other standard should be, First Arabian extracts quotations from this Court's opinion in *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365 (1978), for the proposition, tentatively asserted, that the governing standard is one of "logical dependence." Petition for Writ of Certiorari ("Petition"), at 13-14. This reading of *Owen Equipment* is, at best, strained.

In *Owen Equipment,* this Court held that a plaintiff could not assert a nonfederal claim against a nondiverse third-party defendant because to allow assertion of such a claim as ancillary would "eviscerate" and "evade completely" the requirement of complete diversity. 437 U.S. at 375. The Court stated that "the context in which the nonfederal claim is asserted is crucial" in determining whether ancillary jurisdiction exists. *Id.* at 376. In examining the context in which the particular claim at issue in *Owen Equipment* was asserted, the Court emphasized two factors as distinguishing that claim from others in which ancillary jurisdiction had been sustained. First, the Court compared it to a third-party impleader action which, as the Court stated, is *always* ancillary. A third party impleader action depends in part on the resolution of the primary claim; its relation to the original complaint, therefore, is "not mere factual similarity but logical dependence." *Id.* at 376. Second,

the Court noted that, unlike most other ancillary claims, the claim at issue in *Owen Equipment* was asserted by plaintiff, "who voluntarily chose to bring suit upon a state-law claim in a federal court." Claims by a defending party "haled into court against his will" stand on a much different basis. *Id.*

First Arabian attempts to use the Court's third party impleader example as the basis for its argument that *Owen Equipment* announced a new "logical dependence" test for determining whether a particular claim is within the ancillary jurisdiction. But, as the preceding discussion indicates, *Owen Equipment* provides no support for this argument. *Owen Equipment* certainly does not say that it is setting forth a new standard. And surely the Court's characterization of a particular type of claim (impleader) that is always within the ancillary jurisdiction—a characterization issued in the course of a discussion about an "example" of claims within the ancillary jurisdiction—cannot be read to announce a departure from previous, longstanding decisions. Indeed, were "logical dependence" the governing standard, it is difficult to imagine any claim other than third-party impleader that would satisfy it.

In order to buttress its "logical dependence" argument, First Arabian relies heavily on three cases from the Fifth and Eleventh Circuits: *Amco Construction Co. v. Mississippi State Building Commission,* 602 F.2d 730 (5th Cir. 1979); *Travelers Insurance Co. v. First National Bank of Shreveport,* 675 F.2d 633 (5th Cir. 1982); and *Eagerton v. Valuations, Inc.,* 698 F.2d 1115 (11th Cir. 1983). This reliance is misplaced. In each of these cases, "logical relationship" is stated as the governing standard. *See Amco, supra,* 602 F.2d at 733; *Travelers, supra,* 675 F.2d at 638; *Eagerton, supra,* 698 F.2d at 1119. And in none of them is "logical dependence" adopted as the sole and governing standard; rather, all hold that a claim is within the ancillary jurisdiction if there is a logical relationship between it and the principal claim and the "same aggregate of operative facts serves as the basis for both claims." *Id.*

Petitioner invites this Court to grant certiorari in this case in order to elaborate "substantive criteria that are determinative of the existence of a proper cross-claim and the methodology by which those criteria are applied" and "to supplement *Owen Equipment* relative to particulars of ancillary jurisdiction." Petition, at 10, 15. Apparently, petitioner would like this Court to announce some general, all-encompassing rule. But this is precisely what the Court has previously declined to do in a related situation, and for good reason:

> For purposes of addressing the jurisdictional question in this case, however, we think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.

Aldinger v. Howard, 427 U.S. 1, 13 (1976).

The principle stated in *Aldinger* applies here as well: the question of whether ancillary jurisdiction exists, given the various contexts in which the question can arise and the myriad of potential fact situations, simply cannot be reduced to some precise and mechanical rule or formulation. Rather, the question must be decided on a case-by-case basis within the general parameters set forth by this Court in such cases as *Moore* and *Owen Equipment.* Although one might argue with the results in various cases and point to some differences in the articulation of the standard, the lower federal courts have been deciding the question on precisely that basis for the fifty-seven years since *Moore.* The Sixth Circuit's decision below is an unexceptionable application of these settled principles. Respondent's cross-claim bore a logical relationship to the plaintiff's original claim, arose out of the same transaction or occurrence, and was based on the same operative facts; it was, as both the District Court and the Sixth Circuit found, clearly within the District Court's ancillary jurisdiction.

III.

THE DISTRICT COURT'S RETENTION OF THE CROSS-CLAIM AFTER THE PRINCIPAL CLAIM HAD BEEN SETTLED WAS A PROPER EXERCISE OF ITS DISCRETION.

Petitioner argues, in the third section of its Petition, that even if respondent's claim was supported by ancillary jurisdiction, it should have been dismissed because the federal claim was settled prior to trial. Again, petitioner attempts to create controversy where none exists by stating that the circuits have adopted inconsistent positions on this issue. This is simply not true.

Petitioner cites no cases holding that the federal courts do not have the *power* to exercise jurisdiction over an ancillary claim after the federal claims have been dismissed or settled prior to trial. Indeed, the cases it relies upon (those cited in footnote 11 of the Petition and related text for the proposition that ancillary state claims should generally be dismissed when the primary federal claim has been settled) expressly recognize that the question is one of discretion. *See Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1041-42 (5th Cir. 1982) (because "there will be instances in which retention of the third-party claim, even after the settlement of the main claim, may be appropriate," district courts have a "measure of discretion in determining whether to retain their ancillary jurisdiction over appended state claims"); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 458-59 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982) (on remand, district court to balance relevant considerations in determining whether to retain ancillary claims); *Waste Systems, Inc. v. Clean Land Air Water Corp.*, 683 F.2d 927, 930-31 (5th Cir. 1982) (jurisdiction exists, but district court abused discretion in retaining state law claim in view of unresolved technical questions of state law); *Putnam v. Williams*, 652 F.2d 497, 502 (5th Cir. 1981) (jurisdiction exists, but no abuse of discretion in dismissing ancillary claims);

Tinker v. DeMaria Porsche-Audi, Inc., 632 F.2d 520, 523 (5th Cir. 1980) (refusal to exercise jurisdiction "not an abuse of discretion"); *Federman v. Empire Fire and Marine Insurance Co.*, 597 F.2d 798, 809 (2d Cir. 1979) (potential prejudice to third-party plaintiff was properly considered, and district court did not abuse discretion in retaining case instead of dismissing it); *Propps v. Weihe, Black & Jeffries*, 582 F.2d 1354, 1356 (4th Cir. 1978) ("abuse of discretion is the test"; here, no abuse of discretion in dismissing third party complaint); *Rosario v. American Export-Isbrandsten Lines, Inc.*, 531 F.2d 1227, 1233 n.17 (3d Cir. 1976), *cert. denied*, 429 U.S. 857 (1977) (court's power to retain ancillary claim characterized as "discretionary"). The only other case cited, *McDonald v. Oliver*, 642 F.2d 169 (5th Cir. 1981), does not even address the relevant issue because of the unusual circumstance that the ancillary claim had not been filed until after the original lawsuit had been dismissed.

The existence of continued power to hear and decide ancillary claims follows from the well-established rule that jurisdiction, once acquired, is not lost because of subsequent events. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 404-405 & n.6 (1970):

> We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.[6] The Court has shunned this view.

[6] A persuasive analogy is to be found in the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well-founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of $10,000.

Thus, the sole question presented by this aspect of the Petition is whether the District Court abused its discretion in retaining Pharaon's ancillary cross-claim. That Court clearly recognized that the issue called for the exercise of its discretion

(Appendix, at 13a-16a) and its decision to retain jurisdiction cannot be faulted. Among the factors supporting the District Court's decision, some of which it explicitly relied upon, are the following: the case, and the cross-claim, had been pending for a long time; petitioner had waited until the absolutely last moment to raise its jurisdictional objection; dismissal would have severely prejudiced respondent, in that he would likely have been faced with personal jurisdiction and forum non conveniens objections from petitioner had he been forced to refile his action in the state courts; and, as the District Court noted in denying petitioner's leave to amend its pleadings, petitioner's defenses to respondent's claim were of "doubtful legal sufficiency." In addition, the possibility of dismissal of Pharaon's cross-claim would likely have prevented the settlement of the principal claim. The cross-claim was expressly excluded from the settlement, and the amount Pharaon paid in settlement to Broad and Kaufman ($25,000) was far less significant than his claim against First Arabian.

In sum, the District Court based its decision to retain jurisdiction on good sense and the eminently reasonable ground that dismissal would work substantial injustice, in that it would allow petitioner yet another opportunity to delay—and possibly avoid—payment of its just debt and would reward petitioner's dilatory and obstructionist tactics by permitting it to continue to retain, for perhaps many years, money owing respondent and to earn for itself in the interim the then-substantial difference between the legal and market interest rates. As the Fifth Circuit put it in a similar case, "judicial economy, convenience and fairness to the litigants—the hallmarks of the pendent jurisdiction doctrine—" were better served by the District Court's exercise of its discretionary jurisdiction. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295 (5th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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